

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Judicial Review of Agency Action

February 1997

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

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This publication (#194) will appear in Volume 27 of the Commission's *Reports, Recommendations, and Studies*.

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NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Judicial Review of Agency Action*, 27 Cal. L. Revision Comm'n Reports 1 (1997).

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STATE OF CALIFORNIA

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February 27, 1997

To: The Honorable Pete Wilson
Governor of California, and
The Legislature of California

This recommendation would replace the various existing procedures for judicial review of agency action with a single straight-forward statute for judicial review of all forms of state action, whether quasi-judicial, quasi-legislative, or otherwise, and of most nonlegislative forms of local agency action. It would clarify the standard of review and the rules for standing, exhaustion of administrative remedies, limitations periods, and other procedural matters.

This recommendation is submitted pursuant to Resolution Chapter 38 of the Statutes of 1996.

Respectfully submitted,

Allan L. Fink
Chairperson

ACKNOWLEDGMENTS

The Law Revision Commission developed this recommendation with the input of scores of individuals, agencies, and organizations, many of whom regularly attended Commission meetings and commented on drafts. The Commission appreciates their substantial involvement and contributions. The participation of a broad spectrum of experts and other persons interested in judicial review of agency action aids the Commission in preparing a better recommendation. The Commission benefits greatly from the public service performed by these individuals, agencies, and organizations.

Inclusion of the name of an individual, agency, or organization should not be taken as an indication of the person's position or opinion on any part of the recommendation. The Commission regrets any errors or omissions that may have been made in compiling these acknowledgments.

CONSULTANT

The Commission is indebted to its consultant on this project, Professor Michael Asimow of UCLA Law School. Professor Asimow prepared the background studies from which this recommendation evolved, and provided the Commission with invaluable advice at public meetings where the matter was considered.

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JUDICIAL REVIEW OF AGENCY ACTION

BACKGROUND

This recommendation on judicial review of agency action is the second major part of the Commission's continuing study of administrative law.¹ The first part, governing administrative adjudication by state agencies, was enacted in 1995.² The next part of the study will cover administrative rulemaking.

This recommendation proposes that California's antiquated provisions for judicial review of agency action by administrative mandamus be replaced with a single, straightforward statute for judicial review of all forms of state action and most forms of non-legislative local agency action.³ The goal is to allow litigants and courts to resolve swiftly the substantive issues in dispute, rather than to waste resources disputing tangential procedural issues.

1. The Commission retained Professor Michael Asimow of UCLA Law School to serve as a consultant and prepare background studies. Professor Asimow prepared three studies on judicial review of agency action for the Commission, which are included in this report: (1) Asimow, *Judicial Review of Administrative Decision: Standing and Timing* (Sept. 1992), printed *infra*, 27 Cal. L. Revision Comm'n Reports 229 (1997); (2) Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157 (1995), reprinted *infra*, 27 Cal. L. Revision Comm'n Reports 309 (1997); and (3) Asimow, *A Modern Judicial Review Statute to Replace Administrative Mandamus* (Nov. 1993), printed *infra*, 27 Cal. L. Revision Comm'n Reports 403 (1997).

2. 1995 Cal. Stat. ch. 938. See *Administrative Adjudication by State Agencies*, 25 Cal. L. Revision Comm'n Reports 55 (1995).

3. The proposed law does not apply to judicial review of an ordinance or regulation enacted by a county board of supervisors or city council, whether legislative, executive, or administrative in nature.

REPLACING MANDAMUS AND OTHER FORMS OF JUDICIAL REVIEW

Under existing law, on-the-record adjudicatory decisions of state and local government are reviewed by superior courts under the administrative mandamus provisions of Code of Civil Procedure Section 1094.5.⁴ Regulations adopted by state agencies are reviewed by superior courts in actions for declaratory judgment.⁵ Various other agency actions are reviewed by traditional mandamus under Code of Civil Procedure Section 1085⁶ or by declaratory judgment.⁷ Many statutes set forth special review procedures for particular agencies.⁸

There are many problems with this patchwork scheme. First, it is often unclear whether judicial review should be sought by administrative mandamus, traditional mandamus,

4. Asimow, *A Modern Judicial Review Statute to Replace Administrative Mandamus*, 27 Cal. L. Revision Comm'n Reports 403 (1997); see also Code Civ. Proc. § 1094.6(a) (local agency).

5. Gov't Code § 11350(a); Code Civ. Proc. § 1060.

6. See, e.g., *Vernon Fire Fighters v. City of Vernon*, 107 Cal. App. 3d 802, 165 Cal. Rptr. 908 (1980); *Shuffer v. Board of Trustees*, 67 Cal. App. 3d 208, 136 Cal. Rptr. 527 (1977).

7. See, e.g., *Californians for Native Salmon Ass'n v. Department of Forestry*, 221 Cal. App. 3d 1419, 271 Cal. Rptr. 270 (1990). Agency action can also be reviewed in the context of enforcement actions or criminal actions brought against individuals for violation of regulatory statutes or rules.

8. Nonadjudicative decisions of the Public Utilities Commission are reviewed by the California Supreme Court. Pub. Util. Code § 1756; Cal. R. Ct. 58. Adjudicative decisions of the PUC are reviewed either by the Supreme Court or courts of appeal. Pub. Util. Code § 1756. Decisions of the Public Employment Relations Board and Agricultural Labor Relations Board are reviewed by the courts of appeal. Gov't Code §§ 3520, 3542, 3564; Lab. Code § 1160.8. Decisions of the State Energy Resources Conservation and Development Commission are reviewed in the same manner as decisions of the PUC. Pub. Res. Code § 25531. Decisions of the Department of Alcoholic Beverage Control, Alcoholic Beverage Control Appeals Board, and Workers' Compensation Appeals Board are reviewed either by the Supreme Court or the court of appeal. Bus. & Prof. Code §§ 23090, 23090.5; Lab. Code §§ 5950, 5955.

or declaratory relief. If an action for administrative mandamus can be brought, it must be brought under the administrative mandamus provisions.⁹ Parties regularly file under the wrong provisions. Some cases hold that if the trial court uses the wrong writ, the case must be reversed on appeal so it can be retried under the proper procedure, even if no one objects.¹⁰

Second, it is often difficult to decide which form of mandamus to use because of the problematic distinction between quasi-legislative and quasi-judicial action, especially in local land use planning and environmental decisions. Administrative mandamus is proper to review quasi-judicial action, while traditional mandamus or declaratory relief is proper to review quasi-legislative action.¹¹

Third, if administrative mandamus is unavailable because statutory requirements are not met, and traditional mandamus is unavailable because there has been no deprivation of a clear legal right or an abuse of discretion, the case will be unreviewable by the courts.

Both administrative and traditional mandamus involve complex rules of pleading and procedure. The proceeding may be commenced by a petition for issuance of an alternative writ of mandamus or by a notice of motion for a peremptory writ.¹² Trial courts must distinguish between these two forms of mandamus because there are many differences between them, including use of juries,¹³ statutes of limita-

9. See California Administrative Mandamus § 1.8, at 8 (Cal. Cont. Ed. Bar, 2d ed. 1989).

10. See, e.g., *Eureka Teachers Ass'n v. Board of Educ.*, 199 Cal. App. 3d 353, 244 Cal. Rptr. 240 (1988).

11. *Brock v. Superior Court*, 109 Cal. App. 2d 594, 241 P.2d 283 (1952).

12. See Code Civ. Proc. § 1088; California Administrative Mandamus § 9.1, at 307 (Cal. Cont. Ed. Bar, 2d ed. 1989).

13. Compare Code Civ. Proc. § 1090 with Code Civ. Proc. § 1094.5(a).

tions,¹⁴ exhaustion of remedies,¹⁵ stays,¹⁶ open or closed record,¹⁷ whether the agency must make findings,¹⁸ and possibly scope of review of factual issues.¹⁹

This awkward hybrid is the result of the historical development of judicial review procedures in California. At the time the administrative mandamus concept was devised in 1945, the California Constitution was thought to limit the ability of the Legislature to affect appellate jurisdiction of the courts.²⁰ Since that time, the Constitution has been amended to delete the reference to the “writ of review,” and has been construed to allow the Legislature greater latitude in prescribing appropriate forms of judicial review if court discretion to deny review is preserved.²¹

The Law Revision Commission recommends that the archaic judicial review system that has evolved over the years

14. See, e.g., *Griffin Homes, Inc. v. Superior Court*, 229 Cal. App. 3d 991, 1003-07, 280 Cal. Rptr. 792 (1991).

15. See *Bollengier v. Doctors Medical Ctr.*, 222 Cal. App. 3d 1115, 1125, 272 Cal. Rptr. 273 (1990).

16. See Code Civ. Proc. § 1094.5(g)-(h).

17. See Code Civ. Proc. § 1094.5(e); *Del Mar Terrace Conservancy, Inc. v. City Council*, 10 Cal. App. 4th 712, 725-26, 12 Cal. Rptr. 2d 785, 793 (1992).

18. See, e.g., *California Aviation Council v. City of Ceres*, 9 Cal. App. 4th 1384, 12 Cal. Rptr. 2d 163 (1992); *Eureka Teachers Ass’n v. Board of Educ.*, 199 Cal. App. 3d 353, 244 Cal. Rptr. 240 (1988).

19. *Compare* Code Civ. Proc. § 1094.5(c) (administrative mandamus to review adjudication) *with* *Strumsky v. San Diego County Employees Retirement Ass’n*, 11 Cal. 3d 28, 34 n.2, 520 P.2d 29, 112 Cal. Rptr. 805 (1974) (distinction between review of adjudicative and quasi-legislative act). See Asimow, *supra* note 4, at 411. *But see* *Del Mar Terrace Conservancy, Inc. v. City Council*, 10 Cal. App. 4th 712, 725, 12 Cal. Rptr. 2d 785, 793 (1992) (same standard of review in administrative and traditional mandamus).

20. Judicial Council of California, *Tenth Biennial Report* (1944).

21. See, e.g., *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.*, 24 Cal. 3d 335, 348-51, 595 P. 2d 579, 156 Cal. Rptr. 1 (1979). See also *Powers v. City of Richmond*, 10 Cal. 4th 85, 893 P.2d 1160, 40 Cal. Rptr. 2d 839 (1995).

be replaced by a simple and straightforward statute. The proposed law provides that final state or local agency action²² is reviewable by a petition for review filed with the appropriate court. Common law writs such as mandamus, certiorari, and prohibition, and equitable remedies such as injunction and declaratory judgment, would be replaced for judicial review of agency action by the unified scheme of the proposed law.²³ The proposed law makes clear the court continues to have discretion summarily to deny relief if the petition for review does not present a substantial issue for resolution by the court.²⁴

22. The proposed law does not apply to judicial review of ordinances, regulations, or legislative resolutions, enacted by a county board of supervisors or city council. These matters will continue to be reviewed by traditional mandamus or by an action for declaratory or injunctive relief. See, e.g., *Carlton Santee Corp. v. Padre Dam Mun. Water Dist.*, 120 Cal. App. 3d 14, 18-19, 174 Cal. Rptr. 413 (1981) (mandamus to review validity of water district ordinance); 2 G. Ogden, *California Public Agency Practice* § 50.02[3][a] (1996).

23. The proposed law provides that an action to prevent an illegal expenditure by a local governmental entity under Section 526a of the Code of Civil Procedure must be brought under the proposed law. See *infra* text accompanying note 50. See generally Asimow, *Judicial Review of Administrative Decision: Standing and Timing*, 27 Cal. L. Revision Comm'n Reports 235-36 (1997); Asimow, *supra* note 4, at 422. The proposed law also makes clear that it does not apply where a statute provides for judicial review by a trial de novo, does not apply to an action for refund of taxes under Section 5140 or 5148 or under Division 2 of the Revenue and Taxation Code, does not apply to an action under the California Tort Claims Act, does not apply to litigation in which the sole issue is a claim for money damages or compensation if the agency whose action is at issue does not have statutory authority to determine the claim, does not apply to validating proceedings under the Code of Civil Procedure, does not apply to judicial review of a decision of a court, does not apply to judicial review of an award in binding arbitration under Government Code Section 11420.10, does not apply to judicial review of agency proceedings pursuant to a court-ordered reference, and does not limit use of the writ of habeas corpus. The proposed law does apply to judicial review of property taxation under Division 1 of the Revenue and Taxation Code, other than under Section 5140 or 5148 of that code.

24. This discretion appears necessary to avoid constitutional issues. See *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.*, 24 Cal. 3d 335, 350-51, 595 P. 2d 579, 156 Cal. Rptr. 1 (1979).

AGENCIES TO WHICH PROPOSED LAW APPLIES

Existing statutes draw little or no distinction between judicial review of state and local agency action. The proposed law applies to all state and local government agencies, except three that are specifically exempted — the State Bar Court, Public Utilities Commission, and power plant siting decisions of the State Energy Resources Conservation and Development Commission. The State Bar Court is exempted because, under the constitutional doctrine of separation of powers, regulation of attorney discipline is a judicial function where the California Supreme Court has inherent and primary regulatory power.²⁵ The Public Utilities Commission is exempted because recently enacted²⁶ procedures for judicial review of PUC matters are significantly different from the proposed law.²⁷ Power plant siting decisions of the Energy Commission are exempted for reasons similar to the PUC exemption: these decisions are reviewed in the same manner as nonadjudicative decisions of the PUC,²⁸ and are therefore reviewed exclusively in the California Supreme Court.

Under existing law, decisions of some nongovernmental entities are subject to judicial review by administrative mandamus.²⁹ The proposed law generally continues this rule.

25. See 1 B. Witkin, *California Procedure Attorneys* §§ 356-57, at 438-40 (4th ed. 1996); Cal. R. Ct. 952 (rev. Mar. 15, 1991).

26. 1996 Cal. Stat. ch. 855.

27. Judicial review of nonadjudicative action of the Public Utilities Commission is exclusively in the California Supreme Court. Pub. Util. Code § 1756(a). Procedures for judicial review of adjudicative action of the PUC differ from the proposed law with respect to additional evidence, limitations period, type of relief, standard of review of application of law to fact, and venue. See *id.* §§ 1216, 1353, 1756, 1757, 1757.1, 1758, 1760.

28. Pub. Res. Code § 25531.

29. See, e.g., *Anton v. San Antonio Community Hosp.*, 19 Cal. 3d 802, 814, 567 P.2d 1162, 140 Cal. Rptr. 442 (1979); *Pomona College v. Superior Court*, 45 Cal. App. 4th 1716, 53 Cal. Rptr. 2d 662 (1996); *Delta Dental Plan v.*

RULES OF PROCEDURE

The proposed law provides a few key procedural rules for judicial review, and authorizes the Judicial Council to provide procedural detail by rule not inconsistent with the proposed law. The proposed law generalizes the rule in administrative mandamus that proceedings are heard by the court sitting without a jury.³⁰

Where no specific procedural rule is applicable, normal rules of civil procedure govern judicial review.³¹

STANDING TO SEEK JUDICIAL REVIEW

Existing California law on standing to seek judicial review of agency action is mostly uncodified.³² A petitioner for administrative or traditional mandamus to review a decision of a state or local agency must be beneficially interested in,³³ or aggrieved by,³⁴ the decision. This requirement is applied in various ways, depending on whether the action being

Banasky, 27 Cal. App. 4th 1598, 33 Cal. Rptr. 2d 381 (1994); Wallin v. Vienna Sausage Mfg. Co., 156 Cal. App. 3d 1051, 203 Cal. Rptr. 375 (1984); Bray v. International Molders & Allied Workers Union, 155 Cal. App. 3d 608, 202 Cal. Rptr. 269 (1984); Coppennoll v. Board of Directors, 138 Cal. App. 3d 915, 188 Cal. Rptr. 394 (1983).

30. Code Civ. Proc. § 1094.5(a). In traditional mandamus, the court has discretion to submit factual issues to a jury. Code Civ. Proc. § 1090. In practice, however, juries are seldom used in writ proceedings because factual issues are usually limited and most courts prefer to decide them without the aid of a jury. California Civil Writ Practice § 9.75, at 327 (Cal. Cont. Ed. Bar, 3d ed. 1996).

31. The proposed law provides that Code of Civil Procedure Section 426.30 relating to compulsory cross-complaints, and Section 1013(a) relating to extension of time where notice is mailed, do not apply to a judicial review proceeding.

32. Asimow, *Judicial Review of Administrative Decision: Standing and Timing*, 27 Cal. L. Revision Comm'n Reports 234 (1997).

33. Code Civ. Proc. § 1086.

34. Grant v. Board of Medical Examiners, 232 Cal. App. 2d 820, 827, 43 Cal. Rptr. 270, 275 (1965); Silva v. City of Cypress, 204 Cal. App. 2d 374, 22 Cal. Rptr. 453 (1962).

reviewed is administrative adjudication, rulemaking, or quasi-legislative, informal, or ministerial action.

Administrative Adjudication and State Agency Regulations

A person seeking administrative mandamus to review an adjudicative proceeding under the Administrative Procedure Act must have been a party in the adjudicative proceeding.³⁵ A person seeking administrative mandamus to review an adjudicative proceeding not under the Administrative Procedure Act must have been either a party or a person authorized to participate as an interested party.³⁶ The proposed law codifies these rules.

For review of a state agency regulation by declaratory relief, the petitioner must be an interested person,³⁷ i.e., a person subject to or affected by the regulation.³⁸ If a regulation is reviewed by mandamus, the petitioner may have public interest standing by showing that he or she is interested as a citizen in having the law executed and the duty in question enforced.³⁹ The proposed law generally continues these rules.

Quasi-Legislative, Informal, or Ministerial Action

A person seeking traditional mandamus to review agency action other than an adjudicative proceeding or state agency

35. *Temescal Water Co. v. Department of Public Works*, 44 Cal. 2d 90, 279 P.2d 1 (1955); *Covert v. State Bd. of Equalization*, 29 Cal. 2d 125, 173 P.2d 545 (1946).

36. *Bodinson Mfg. Co. v. California Employment Comm'n*, 17 Cal. 2d 321, 330, 109 P.2d 935, 9041 (1941). Public interest standing may apply to review an adjudication in some cases. See, e.g., *Environmental Law Fund, Inc. v. Town of Corte Madera*, 49 Cal. App. 3d 105, 114, 122 Cal. Rptr. 282 (1975).

37. Gov't Code § 11350(a).

38. *Sperry & Hutchinson Co. v. California State Bd. of Pharmacy*, 241 Cal. App. 2d 229, 232-33, 50 Cal. Rptr. 489 (1966).

39. *Green v. Obledo*, 29 Cal. 3d 126, 144-45, 624 P.2d 256, 172 Cal. Rptr. 206 (1981); *American Friends Service Comm. v. Proconier*, 33 Cal. App. 3d 252, 256, 109 Cal. Rptr. 22 (1973). See also discussion *infra* under "Public interest standing" in text accompanying notes 49-50.

rulemaking must show that a substantial right is affected and that the person will suffer substantial damage if the action is not annulled.⁴⁰ This requirement is relaxed if a public right is involved and judicial review is sought to enforce a public duty, in which case it is enough that the person seeking review is interested as a citizen in having the laws executed and the public duty enforced.⁴¹

Private interest standing. By case law, a person has sufficient private interest to confer standing if the agency action is directed to that person, or if the person's interest is over and above that of members of the general public.⁴² Non-pecuniary interests such as environmental or esthetic claims are sufficient to meet the private interest test.⁴³ Associations such as unions, trade associations, or political associations have standing to sue on behalf of their members.⁴⁴ But if a person has not suffered some kind of harm from the agency action,

40. *Parker v. Bowron*, 40 Cal. 2d 344, 351, 254 P.2d 6, 9 (1953); *Grant v. Board of Medical Examiners*, 232 Cal. App. 2d 820, 827, 43 Cal. Rptr. 270, 275 (1965).

41. *Board of Social Welfare v. County of Los Angeles*, 27 Cal. 2d 98, 101, 162 P.2d 627 (1945); California Administrative Mandamus § 5.1, at 210 (Cal. Cont. Ed. Bar, 2d ed. 1989).

42. *Carsten v. Psychology Examining Comm.*, 27 Cal. 3d 793, 796, 614 P.2d 276, 166 Cal. Rptr. 844 (1980); see *Professional Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal. 2d 276, 284-85, 384 P.2d 158 (1963).

43. See, e.g., *Bozung v. Local Agency Formation Comm'n*, 13 Cal. 3d 263, 272, 529 P.2d 1017, 118 Cal. Rptr. 249 (1975); *Albion River Watershed Protection Ass'n v. Department of Forestry*, 235 Cal. App. 3d 358, 286 Cal. Rptr. 573, 580-88 (1991); *Kane v. Redevelopment Agency*, 179 Cal. App. 3d 899, 224 Cal. Rptr. 922 (1986); *Citizens Ass'n for Sensible Dev. v. County of Inyo*, 172 Cal. App. 3d 151, 159, 217 Cal. Rptr. 893 (1985).

44. *Brotherhood of Teamsters v. Unemployment Ins. Appeals Bd.*, 190 Cal. App. 3d 1515, 1521-24, 236 Cal. Rptr. 78 (1987); *Residents of Beverly Glen, Inc. v. City of Los Angeles*, 34 Cal. App. 3d 117, 109 Cal. Rptr. 724 (1973). See also *County of Alameda v. Carleson*, 5 Cal. 3d 730, 737 n.6, 488 P.2d 953, 97 Cal. Rptr. 385 (1971).

the person lacks private interest standing to seek judicial review.⁴⁵ The proposed law codifies these rules.

Under the proposed law, the person seeking review need not personally have objected to the agency action, as long as the issue to be reviewed was raised before the agency by someone.⁴⁶ This avoids the undesirable effect of requiring a person seeking review to associate in the review process another person who did protest to the agency but is not now interested in the judicial review proceeding.

The proposed law denies a person who complained to an agency about a professional licensee standing to challenge an agency decision in favor of the licensee.⁴⁷

The proposed law makes clear that a local agency may have private interest standing to seek judicial review of state action, and relaxes the limiting rule that local government has standing for constitutional challenges under the commerce or supremacy clause but not under the due process, equal protection, or contract clauses. There is no sound reason to treat certain constitutional claims differently for standing purposes.⁴⁸

Public interest standing. The proposed law codifies case law in traditional mandamus that a person who lacks private interest standing may nonetheless sue to vindicate the public

45. *Parker v. Bowron*, 40 Cal. 2d 344, 254 P.2d 6 (1953); *Grant v. Board of Medical Examiners*, 232 Cal. App. 2d 820, 43 Cal. Rptr. 270 (1965); *Silva v. City of Cypress*, 204 Cal. App. 2d 374, 22 Cal. Rptr. 453 (1962).

46. See *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 267-68, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972) (administrative mandamus to set aside planning commission's issuance of conditional use and building permits).

47. An exception to this rule permits the complaining person to challenge the agency decision if the person was either a party to the administrative proceeding or had a right to become a party under a statute specific to that agency. However, under existing law a complaining person has no general right to become a party to an administrative proceeding. See *California Administrative Hearing Practice* § 2.45, at 85 (Cal. Cont. Ed. Bar 1984).

48. Asimow, *supra* note 32, at 242 n.31. The proposed law does not adopt the federal or Model Act zone of interest test. See generally *id.* at 242-43.

interest.⁴⁹ This promotes the policy of allowing a citizen to ensure that a government body does not impair or defeat the purpose of legislation establishing a public right. The proposed law adds safeguards to public interest standing by requiring the person to reside or conduct business in the agency's jurisdiction, requires that the person will adequately protect the public interest, and requires the person first to request the agency to correct its action and to show that the agency has not done so within a reasonable time.

The proposed law provides that a taxpayers' suit to restrain illegal or wasteful expenditures⁵⁰ must be brought under the proposed law, and continues the rule that a plaintiff in such an action has standing without the need to show any individual harm.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

Under existing law, a litigant must fully complete all federal, state, and local administrative remedies before coming to court or defending against administrative enforcement unless an exception to the exhaustion of remedies rule applies.⁵¹ The proposed law codifies the exhaustion of remedies rule, including the rule that exhaustion of remedies is jurisdictional rather

49. See, e.g., *Green v. Obledo*, 29 Cal. 3d 126, 144-45, 624 P.2d 256, 172 Cal. Rptr. 206 (1981); *Hollman v. Warren*, 32 Cal. 2d 351, 196 P.2d 562 (1948); *Board of Social Welfare v. County of Los Angeles*, 27 Cal. 2d 98, 162 P.2d 627 (1945); *California Homeless & Housing Coalition v. Anderson*, 31 Cal. App. 4th 450, 37 Cal. Rptr. 2d 639 (1995); *Environmental Law Fund, Inc. v. Town of Corte Madera*, 49 Cal. App. 3d 105, 122 Cal. Rptr. 282 (1975); *American Friends Service Committee v. Proconier*, 33 Cal. App. 3d 252, 109 Cal. Rptr. 22 (1973).

50. Code Civ. Proc. § 526a.

51. *South Coast Regional Comm'n v. Gordon*, 18 Cal. 3d 832, 558 P.2d 867, 135 Cal. Rptr. 781 (1977); *People v. Coit Ranch, Inc.*, 204 Cal. App. 2d 52, 57-58, 21 Cal. Rptr. 875 (1962).

than discretionary with the court.⁵² The proposed law provides exceptions to the exhaustion of remedies rule to the extent administrative remedies are inadequate⁵³ or where requiring their exhaustion would result in irreparable harm disproportionate to the public and private benefit from requiring exhaustion.⁵⁴ The proposed law continues the rule of existing statutes that a litigant is not required to request reconsideration from the agency before seeking judicial review.⁵⁵

The proposed law codifies the rule that, in order to be considered by the reviewing court, the exact issue must first have been presented to the agency. The proposed law reverses existing law by requiring exhaustion of remedies for a local tax assessment alleged to be a nullity. The proposed law eliminates the rule that in an adjudicative proceeding agency denial of a request for a continuance is judicially reviewable immediately.⁵⁶ Judicial review of such matters should not

52. "Jurisdictional" in this context does not mean that the court wholly lacks power to hear the matter before administrative remedies have been exhausted. Rather it means that a writ of prohibition or certiorari from a higher court will lie to prevent a lower court from hearing it. See *Abelleira v. District Court of Appeal*, 17 Cal. 2d 280, 102 P.2d 329 (1941).

53. The inadequacy requirement includes and accommodates existing California exceptions to the exhaustion of remedies rule for futility, certain constitutional issues, and lack of notice. *Asimow*, *supra* note 32, at 279.

54. This provision was taken from the 1981 Model State Administrative Procedure Act, 15 U.L.A. 1 (1990). The proposed law expands the factors to be considered to include private as well as public benefit.

55. Gov't Code §§ 11523 (Administrative Procedure Act), 19588 (State Personnel Board). However, the common law rule in California may be otherwise. See *Alexander v. State Personnel Bd.*, 22 Cal. 2d 198, 137 P.2d 433 (1943). This rule would not preclude a litigant from requesting reconsideration or an agency on its own motion from reconsidering.

56. Gov't Code § 11524(c). Such a denial will be subject to general rules requiring exhaustion of remedies, and thus will be subject to a possible exception because administrative remedies are inadequate or because to require exhaustion would result in irreparable harm. Similarly, judicial review of discovery orders will be postponed until after conclusion of the administrative proceeding.

occur until after conclusion of administrative proceedings.⁵⁷

PRIMARY JURISDICTION

Under the doctrine of primary jurisdiction, a case properly filed in court may be shifted to an administrative agency that also has statutory power to resolve some or all of the issues in the case.⁵⁸ Thus the agency makes the initial decision in the case, but the court retains power to review the agency action.

The proposed law makes clear the doctrine of primary jurisdiction is distinct from exhaustion of remedies.⁵⁹ It provides that the court should send an entire case, or one or more issues in the case, to an agency for an initial decision only where the Legislature intended that the agency have exclusive or concurrent jurisdiction over that type of case or issue, or where the benefits to the court in doing so outweigh the extra delay and cost to the litigants.⁶⁰

57. *Cf. Stenocord Corp. v. City and County of San Francisco*, 2 Cal. 3d 984, 471 P.2d 966, 88 Cal. Rptr. 166 (1970) (complaint for recovery of taxes).

58. Asimow, *supra* note 32, at 281. The doctrine of primary jurisdiction must be distinguished from the doctrine of exhaustion of remedies. The rules are different with respect to burden of proof, presumption of jurisdiction, and applicability. *Id.* at 283-84.

59. Most California primary jurisdiction cases incorrectly describe the issue as one of exhaustion of remedies. Asimow, *supra* note 32, at 285. The proposed law should clear up much of the confusion. For recent cases analyzing the issue correctly, see *Farmers Ins. Exch. v. Superior Court*, 2 Cal. 4th 377, 826 P.2d 730, 6 Cal. Rptr. 2d 487 (1992); *Miller v. Superior Court*, 50 Cal. App. 4th 1665, 58 Cal Rptr. 2d 584 (1996); *State Farm Fire & Casualty Co. v. Superior Court*, 45 Cal. App. 4th 1093, 53 Cal. Rptr. 2d 229 (1996).

60. If the agency has concurrent jurisdiction, the party seeking to have the matter or issue referred to the agency must persuade the court that the efficiencies outweigh the cost, complexity, and delay inherent in so doing. Asimow, *supra* note 32, at 284. The court in its discretion may ask the agency to file an amicus brief with its views on the matter as an alternative to sending the case to the agency. The court's discretion to refer the matter or issue to the agency for action gives courts considerable flexibility in the interests of justice. See *Farmers Ins. Exch. v. Superior Court*, 2 Cal. 4th 377, 391-92, 826 P.2d 730, 6 Cal. Rptr. 2d 487, 496 (1992).

RIPENESS

The ripeness doctrine in administrative law counsels a court to refuse to hear an attack on the validity of an agency rule or policy until the agency takes further action to apply it in a specific fact situation.⁶¹ The ripeness doctrine is well accepted in California law,⁶² and the proposed law codifies it.

STATUTE OF LIMITATIONS FOR REVIEW OF ADJUDICATION

Existing statutes of limitations for judicial review of agency adjudication are scattered and inconsistent.⁶³ The limitations period for judicial review of adjudication under the Administrative Procedure Act is 30 days,⁶⁴ and for judicial review of a local agency decision other than by a school district is 90 days.⁶⁵ Other sections applicable to particular agencies provide different limitations periods for commencing judicial review.⁶⁶ Adjudicatory action not covered by any of these

61. Asimow, *supra* note 32, at 293.

62. See 2 G. Ogden, California Public Agency Practice § 51.01 (1996).

63. Asimow, *supra* note 32, at 296.

64. Gov't Code § 11523.

65. Code Civ. Proc. § 1094.6(b).

66. See, e.g., Code Civ. Proc. § 706.075 (90 days for withholding order for taxes); Food & Agric. Code §§ 59234.5, 60016 (30 days from notice of filing with court of notice of deficiency of assessment under commodity marketing program); Lab. Code §§ 1160.8 (30 days after ALRB decision), 5950 (45 days for decision of Workers' Compensation Appeals Board); Gov't Code §§ 3542 (30 days for PERB decisions), 19630 (one year for various state personnel decisions), 19815.8 (same), 65907 (90 days for decisions of zoning appeals board); Unemp. Ins. Code § 410 (six months for appeal of decision of Unemployment Insurance Appeals Board); Veh. Code § 14401(a) (90-days after notice of driver's license order); Welf. & Inst. Code § 10962 (one year after notice of decision of Department of Social Services). Various rules on tolling apply to these statutes. See Asimow, *supra* note 32, at 298 n.227.

provisions is subject to the three-year or four-year limitations periods for civil actions generally.⁶⁷

The proposed law continues the 30-day limitations period⁶⁸ for judicial review of adjudication under the Administrative Procedure Act, and generalizes it to apply to most state agency adjudication.⁶⁹ The proposed law continues the 90-day limitations period for local agency adjudication,⁷⁰ except that local agency adjudication under the Administrative Procedure Act will be 30 days as at present.⁷¹ Special limitations periods under the California Environmental Quality Act⁷² and some other provisions⁷³ are preserved. Except where a special

67. These actions are also subject to the defense of laches.

68. The period for judicial review starts to run from the date the agency decision becomes effective, generally 30 days after issuance of the decision. Gov't Code § 11519. The decision will inform the parties of the limitations period for judicial review. Failure to do so extends the period to six months.

69. The proposed law preserves a few limitations periods that are longer than the period prescribed in the proposed law: one-year for review of certain state personnel decisions (Gov't Code § 19630), six months for review of decisions of the Unemployment Insurance Appeals Board (Unemp. Ins. Code § 410), 90 days for review of certain driver's license orders (Veh. Code § 14401(a)), and one year for review of a welfare decision of the Department of Social Services (Welf. & Inst. Code § 10962).

70. The period starts to run from the date the decision is announced or the date the local agency notifies the parties of the last day to file a petition for review, whichever is later.

71. For local agency adjudication now under the Administrative Procedure Act, see Educ. Code §§ 44944 (suspension or dismissal of certificated employee of school district), 44948.5 (employment of certificated employee of school district), 87679 (employee of community college district).

72. Pub. Res. Code § 21167.

73. The proposed law does not override special limitations periods statutorily preserved for policy reasons, such as for judicial review of an administratively-issued withholding order for taxes (Code Civ. Proc. § 706.075), notice of deficiency of an assessment due from a producer under a commodity marketing program (Food & Agric. Code §§ 59234.5, 60016), State Personnel Board (Gov't Code § 19630), Department of Personnel Administration (Gov't Code § 19815.8), cancellation by a city or county of a contract limiting use of agricultural land under the Williamson Act (Gov't Code § 51286), California Environmental Quality Act (Pub. Res. Code § 21167), decision of local legislative body

statute applies, non-adjudicatory action remains subject to the general three or four year limitations period for civil actions.

The proposed law requires the agency to give written notice to the parties of the date by which review must be sought, or of the shortest potentially applicable time period.⁷⁴ This will be particularly helpful to a party who is not represented by counsel. Failure to give the notice will toll the running of the limitations period up to a maximum of 180 days after the decision is effective.⁷⁵

Under the existing Administrative Procedure Act and the existing statute for judicial review of a local agency decision, when a person seeking judicial review makes a timely request for the agency to prepare the record, the time to petition for review is extended until 30 days after the record is delivered.⁷⁶ The proposed law continues and generalizes this rule.

The proposed law does not change the case law rule that an agency may be estopped to plead the statute of limitations if a

adopting or amending a general or specific plan, zoning ordinance, regulation attached to a specific plan, or development agreement (Gov't Code § 65009), cease and desist order of the San Francisco Bay Conservation and Development Commission and complaint by BCDC for administrative civil liability (Gov't Code §§ 66639, 66641.7), Unemployment Insurance Appeals Board (Unemp. Ins. Code §§ 410, 1243), certain driver's license orders (Veh. Code § 14401(a)), or welfare decisions of the Department of Social Services (Welf. & Inst. Code § 10962).

74. The requirement of notice to the party of the time within judicial review must be sought is drawn from existing statutes. See Code Civ. Proc. § 1094.6(f) (local agency action); Unemp. Ins. Code § 410 (notice of right to review); Veh. Code § 14401(b) (notice of right to review). The notice requirement does not apply to proceedings under the California Environmental Quality Act.

75. Concerning the effective date of the decision, see *supra* note 68.

76. Gov't Code § 11523; Code Civ. Proc. § 1094.6(d). Both statutes require that the record be requested within ten days after the decision becomes final to trigger the extension provision. The proposed law extends this 10-day period to 15 days.

party's failure to seek review within the prescribed period was due to misconduct of agency employees.⁷⁷

STANDARD OF REVIEW

Review of Agency Interpretation of Law

Under existing law, courts use independent judgment to review an agency interpretation of law.⁷⁸ This is qualified by the rule that, depending on the context, courts should give great weight to a consistent construction of a statute by the agency responsible for its implementation.⁷⁹ Deference is given to the agency's interpretation if the court finds it appropriate to do so based on a number of factors. These factors are generally of two kinds — factors indicating that the agency has a comparative interpretive advantage over the courts, and factors indicating that the interpretation in question is probably correct.⁸⁰

77. See *Binns v. Savage*, 61 Cal. 2d 520, 393 P.2d 689, 39 Cal. Rptr. 377 (1964).

78. See, e.g., *20th Century Ins. Co. v. Garamendi*, 8 Cal. 4th 216, 271, 878 P.2d 566, 600, 32 Cal. Rptr. 2d 807, 841 (1994); *Pacific Southwest Realty Co. v. County of Los Angeles*, 1 Cal. 4th 155, 171, 820 P.2d 1046, 1056, 2 Cal. Rptr. 2d 536, 546 (1991); *California Ass'n of Psychology Providers v. Rank*, 51 Cal. 3d 1, 11, 793 P.2d 2, 6-7, 270 Cal. Rptr. 796, 800-801 (1990); *Dyna-Med, Inc. v. Fair Employment & Housing Comm'n*, 43 Cal. 3d 1379, 1388-89, 743 P.2d 1323, 1327-28, 241 Cal. Rptr. 67, 71-72 (1987); *Vaessen v. Woods*, 35 Cal. 3d 749, 756-57, 677 P.2d 1183, 1187-89, 200 Cal. Rptr. 893, 897-99 (1984), *cert. denied*, 470 U.S. 1049 (1985); *Carmona v. Division of Indus. Safety*, 13 Cal. 3d 303, 309-10, 530 P.2d 161, 165-66, 118 Cal. Rptr. 473, 477-78 (1975).

79. See, e.g., *Dix v. Superior Court*, 53 Cal. 3d 442, 460, 807 P.2d 1063, 1072, 279 Cal. Rptr. 834, 843 (1991); *Whitcomb Hotel, Inc. v. California Employment Comm'n*, 24 Cal. 2d 753, 757-58, 151 P.2d 233, 236 (1944); *Scates v. Rydingsword*, 229 Cal. App. 3d 1085, 1097, 280 Cal. Rptr. 544, 550-51 (1991); *Guinnane v. San Francisco Planning Comm'n*, 209 Cal. App. 3d 732, 738, 257 Cal. Rptr. 742, 746, *cert. denied*, 493 U.S. 936 (1989).

80. Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1195 (1995).

In the comparative advantage category are factors that assume the agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion. A court is more likely to defer to an agency's interpretation of its own regulation than to its interpretation of a statute, since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another. A court is more likely to defer to an agency's interpretation of a statute that the agency enforces than to its interpretation of some other statute, the common law, the constitution, or judicial precedent.⁸¹

Factors indicating that the interpretation in question is probably correct include the degree to which the agency's interpretation appears to have been carefully considered by responsible agency officials. For example, an interpretation of a statute contained in a regulation adopted after public notice and comment is more deserving of deference than an interpretation contained in an advice letter prepared by a single staff member.⁸² Deference is called for if the agency has consistently maintained the interpretation in question, especially if the interpretation is long-standing. A vacillating position, however, is entitled to no deference.⁸³ An interpretation is more worthy of deference if it first occurred contemporaneously with enactment of the statute being interpreted.⁸⁴ Defer-

81. Asimow, *supra* note 80, at 1195-96.

82. See *Hudgins v. Neiman Marcus Group, Inc.*, 34 Cal. App. 4th 1109, 1125-26, 41 Cal. Rptr. 2d 46, 56 (1995).

83. *Brewer v. Patel*, 20 Cal. App. 4th 1017, 1021-22, 25 Cal. Rptr. 2d 65, 68-69 (1993).

84. See *Woosley v. State*, 3 Cal. 4th 758, 776, 13 Cal. Rptr. 2d 30, 38-39 (1992), *cert. denied*, 113 S. Ct. 2416 (1993); *California Ass'n of Psychology Providers v. Rank*, 51 Cal. 3d 1, 17, 793 P.2d 2, 11, 270 Cal. Rptr. 796, 805 (1990); *Dyna-Med, Inc. v. Fair Employment & Housing Comm'n*, 43 Cal. 3d

ence may also be appropriate if the Legislature reenacted the statute in question with knowledge of the agency's prior interpretation.⁸⁵

When a court reviews a regulation, it normally separates the issues, exercising independent judgment with appropriate deference on interpretive issues, such as whether the regulation conflicts with the governing statute, but applying the abuse of discretion standard on whether the regulation is reasonably necessary to effectuate the purpose of the statute.⁸⁶

The Commission finds existing law on the standard of review of agency interpretation of law to be generally satisfactory. The proposed law continues independent judgment review of agency interpretation of law, with appropriate deference to the agency's interpretation.⁸⁷ The proposed law

1379, 1388-89, 743 P.2d 1323, 1326-28, 241 Cal. Rptr. 67, 70-72 (1987); *International Business Machines v. State Bd. of Equalization*, 26 Cal. 3d 923, 930, 163 Cal. Rptr. 782, 785 (1980); *Nipper v. California Auto. Assigned Risk Plan*, 19 Cal. 3d 35, 44-45, 560 P.2d 743, 747-48, 136 Cal. Rptr. 854, 858-59 (1977); *Whitcomb Hotel, Inc. v. California Employment Comm'n*, 24 Cal. 2d 753, 757, 151 P.2d 233, 235 (1944).

85. See *Moore v. California State Bd. of Accountancy*, 2 Cal. 4th 999, 1017-18, 831 P.2d 798, 808-09, 9 Cal. Rptr. 2d 358, 368-69 (1992); *Nelson v. Dean*, 27 Cal. 2d 873, 882, 168 P.2d 16, 21-22 (1946).

86. See *Moore v. California State Bd. of Accountancy*, 2 Cal. 4th 999, 1015, 831 P.2d 798, 807, 9 Cal. Rptr. 2d 358, 367 (1992); *California Ass'n of Psychology Providers v. Rank*, 51 Cal. 3d 1, 11, 793 P.2d 2, 270 Cal. Rptr. 796 (1990).

87. The proposed law exempts three labor law agencies from the statutory standard of review of questions of law (independent judgment with appropriate deference). These agencies are the Agricultural Labor Relations Board, Public Employment Relations Board, and Workers' Compensation Appeals Board. Thus the standard of review of questions of law for these agencies will continue to be determined by case law. See, e.g., *Banning Teachers Ass'n v. Public Employment Relations Bd.*, 44 Cal. 3d 799, 804, 750 P.2d 313, 244 Cal. Rptr. 671 (1988); *Agricultural Labor Relations Bd. v. Superior Court*, 16 Cal. 3d 392, 400, 411, 546 P.2d 687, 128 Cal. Rptr. 183 (1976); *Judson Steel Corp. v. Workers' Compensation Appeals Bd.*, 22 Cal. 3d 658, 668, 586 P.2d 564, 150 Cal. Rptr. 250 (1978); *United Farm Workers v. Agricultural Labor Relations Bd.*, 41 Cal. App. 4th 303, 48 Cal. Rptr. 2d 696, 703 (1995). These labor agencies are exempted because they must accommodate conflicting and contentious

does not address the standard of review of agency application of law to fact, leaving existing law unaffected.⁸⁸

Review of Agency Factfinding

Basic fact-finding involves determining what happened (or will happen in the future), when it happened, the state of mind of the participants, and the like. Some basic facts are established by direct testimony, some by inference from circumstantial evidence. For example, suppose the agency finds from direct or circumstantial evidence that *E*, an employee of *R*, was driving home from a night school course at the time of the accident. *R* paid for the cost of the night school and encouraged but did not require *E* to take the course. Determinations of basic fact such as these can be made without knowing anything of the applicable law.⁸⁹

Under existing law, in reviewing factual determinations in an adjudication by an agency not given judicial power by the California Constitution, courts use independent judgment if the proceeding substantially deprives a party's fundamental vested right.⁹⁰ California is the only jurisdiction in the United

economic interests, and the Legislature appears to have wanted legal interpretations by these agencies within their regulatory authority to be given greater deference by the courts.

88. See, e.g., *S. G. Borello & Sons, Inc. v. Department of Indus. Relations*, 48 Cal. 3d 341, 349, 769 P.2d 399, 256 Cal. Rptr. 543 (1989); *Halaco Engineering Co. v. South Central Coast Regional Comm'n*, 42 Cal. 3d 52, 74-77, 720 P.2d 15, 227 Cal. Rptr. 667 (1986); Asimow, *supra* note 80, at 1213-14.

89. Asimow, *supra* note 80, at 1211.

90. E.g., *Bixby v. Pierno*, 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971); see generally Asimow, *supra*, note 80. *Bixby* involved judicial review of a decision of the Commissioner of Corporations approving a recapitalization plan of a family-owned corporation as "fair, just and equitable," an exercise of agency discretion. *Bixby v. Pierno*, *supra*, 4 Cal. 3d at 150-51. Exercise of agency discretion is subject to abuse of discretion review under the proposed law. See discussion in text *infra* accompanying notes 101-07. The substantial evidence test of the proposed law for factfinding applies only to the basic facts underlying the decision, not to application of law to basic facts or to the decision itself.

States that uses independent judgment so broadly as a standard for judicial review of agency action.⁹¹

The independent judgment test was imposed by a 1936 California Supreme Court decision on the ground that constitutional doctrines of separation of powers or due process required it.⁹² The test applied to review of fact-finding by state agencies not established by the California Constitution, because it was thought those agencies could not constitutionally exercise judicial power. But courts have subsequently rejected any constitutional basis for the independent judgment test,⁹³ so the Legislature or the courts are now free to abolish it. Nonetheless, courts have continued to apply the independent judgment test to decisions of nonconstitutional state agencies where fundamental vested rights are involved. Thus the substantial evidence test is applied to review decisions of constitutional state agencies, and of nonconstitutional state agencies where fundamental vested rights are not involved. Independent judgment review is applied to nonconstitutional state agencies where substantial vested rights are involved. There is no rational policy basis for distinguishing between agencies established by the constitution and those that are not.

Independent judgment review of state agency adjudication substitutes factual conclusions of a trial judge, often a non-expert generalist, for those of the administrative law judge and agency heads who are usually experienced in their professional field. Especially in cases involving technical material

91. Some states use independent judgment review for particular situations. See, e.g., *Weeks v. Personnel Bd. of Review*, 373 A.2d 176 (R.I. 1977) (discharge of police officer). Colorado uses independent judgment review if a school board dismisses a teacher after the hearing officer recommended retention. Colo. Rev. Stat. § 22-63-302(10)(c) (Supp. 1995). See also Mo. Rev. Stat. § 536.140.2 (1990); Asimow, *supra* note 80, at 1164 n.13.

92. *Standard Oil Co. v. State Bd. of Equalization*, 6 Cal. 2d 557, 59 P.2d 119 (1936).

93. *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.*, 24 Cal. 3d 335, 595 P.2d 579, 156 Cal. Rptr. 1 (1979).

or the clash of expert witnesses, administrative law judges and agency heads are more likely to be in a position to reach the correct decision than a trial judge reviewing the record.⁹⁴

Independent judgment review is inefficient because it requires parties to litigate the peripheral issue of whether or not independent judgment review applies. This involves the loose standard of the degree of “vestedness” and “fundamentalness” of the right affected. Independent judgment review requires closer scrutiny of the record, and the transcript may be lengthy. Independent judgment review also encourages more people to seek judicial review than would do so under a substantial evidence standard.⁹⁵

Except in one limited case, the proposed law eliminates independent judgment review of state agency fact-finding, and instead requires the court to uphold agency findings if supported by substantial evidence in the record as a whole.⁹⁶ Under the exception, if the agency head changes a determination of fact made in an adjudicative proceeding conducted by an administrative law judge employed by the Office of Administrative Hearings, the proposed law preserves independent judgment review of that determination of fact.

Under existing law, fact-finding in adjudication by local agencies is reviewed by the same standard as for state agencies that do not derive judicial power from the California Constitution — independent judgment if a fundamental

94. Asimow, *supra* note 80, at 1181-82.

95. Asimow, *supra* note 80, at 1184-85.

96. An important benefit of the substantial evidence test is that it greatly broadens the power of the appellate court in appeals from trial court decisions reviewing administrative action. Asimow, *supra* note 80, at 1168-69. The proposed law codifies the existing rule that a person challenging agency action has the burden of persuasion on overturning agency action. See California Administrative Mandamus §§ 4.157, 12.7 (Cal. Cont. Ed. Bar, 2d ed. 1989).

vested right is involved, otherwise substantial evidence.⁹⁷ The proposed law continues these rules for local agency adjudication, i.e., proceedings involving an evidentiary hearing to determine a legal interest of a particular person.⁹⁸

Review of Agency Exercise of Discretion

An agency has discretion when the law allows it to choose between several alternative policies or courses of action. Examples include an agency's power to choose a severe or lenient penalty, whether there is good cause to deny a license, whether to grant permission for various sorts of land uses, or to approve a corporate reorganization as fair. An agency might have power to prescribe the permitted level of a toxin in drinking water, to decide whether to favor the environment at the expense of economic development or vice versa, or to decide whom to investigate or charge when resources are limited.⁹⁹

Existing law is replete with conflicting doctrines on these important issues. California courts may review agency discretionary decisions on grounds of legality, procedural irregularity, or abuse of discretion despite broad statutory delegations

97. *Strumsky v. San Diego County Employees Retirement Ass'n*, 11 Cal. 3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (1974).

98. The argument for abandoning independent judgment review is weaker for local agency adjudication than for state agency adjudication. Local agency adjudication is often informal, and lacking procedural protections that apply to state agency hearings, including the administrative adjudication bill of rights. Gov't Code §§ 11410.20 (application to state), 11425.10-11425.60 (administrative adjudication bill of rights) (operative July 1, 1997). Independent judgment review has been justified as needed to salvage administrative procedures which would otherwise violate due process. *Bixby v. Pierno*, 4 Cal. 3d 130, 140 n.6, 481 P.2d 242, 93 Cal. Rptr. 234 (1971). A local agency may voluntarily apply the administrative adjudication bill of rights to its adjudications, Gov't Code § 11410.40 (operative July 1, 1997), but is not required to do so. The Commission has not made a detailed study of procedures in adjudications of the many types of local agencies. In the absence of such a study, the Commission believes existing law should be continued.

99. Asimow, *supra* note 80, at 1224.

of discretionary authority.¹⁰⁰ Under existing law, the court reviews adjudicative and quasi-legislative action by traditional mandamus generally on a closed record, but in reviewing ministerial or informal action, extra-record evidence is freely admissible if the facts are in dispute.¹⁰¹ The agency must give reasons for the discretionary action in the case of review of adjudicatory action,¹⁰² but not in the case of quasi-legislative action.¹⁰³

In reviewing discretionary action, a court first decides whether the agency's choice was legally permissible and whether the agency followed legally required procedures, using independent judgment with appropriate deference.¹⁰⁴ Within these limits, the agency has power to choose between alternatives, and a court must not substitute its judgment for the agency's, since the Legislature gave discretionary power to the agency, not the court. But the court should reverse if the agency's choice was an abuse of discretion. Review for abuse of discretion consists of two distinct inquiries: the ade-

100. See *Saleeby v. State Bar*, 39 Cal. 3d 547, 563, 702 P.2d 525, 534, 216 Cal. Rptr. 367, 376 (1985); *Paulsen v. Golden Gate Univ.*, 25 Cal. 3d 803, 808-09, 602 P.2d 778, 780-81, 159 Cal. Rptr. 858, 860-61 (1979); *Shuffer v. Board of Trustees*, 67 Cal. App. 3d 208, 220, 136 Cal. Rptr. 527, 534 (1977); *Manjares v. Newton*, 64 Cal. 2d 365, 370, 49 Cal. Rptr. 805, 809 (1966).

101. *Western States Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559, 575-79, 888 P.2d 1268, 38 Cal. Rptr. 2d 139, 147-50 (1995); see also discussion *infra* under "Evidence Outside the Administrative Record" in text accompanying notes 115-21.

102. *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974).

103. *California Aviation Council v. City of Ceres*, 9 Cal. App. 4th 1384, 12 Cal. Rptr. 2d 163 (1992); *City of Santa Cruz v. Local Agency Formation Comm'n*, 76 Cal. App. 3d 381, 386-91, 142 Cal. Rptr. 873, 875-77 (1978). *Cf.* *California Hotel & Motel Ass'n v. Industrial Welfare Comm'n*, 25 Cal. 3d 200, 216, 599 P.2d 31, 157 Cal. Rptr. 840, 850 (1979) (statement of basis for decision required by statute).

104. See *California Ass'n of Psychology Providers v. Rank*, 51 Cal. 3d 1, 11, 793 P.2d 2, 270 Cal. Rptr. 796, 800-01 (1990).

quacy of the factual underpinning of the discretionary decision, and the rationality of the choice.¹⁰⁵

In reviewing the adequacy of the factual underpinning, it is not clear whether the abuse of discretion test is merely another way to state the substantial evidence test, or whether the substantial evidence test gives the court greater leeway in reviewing the agency decision, but the prevailing view is that they are synonymous.¹⁰⁶ Legislative history of a 1982 enactment¹⁰⁷ also suggests that substantial evidence is the appropriate test whenever the issue is the factual basis for agency discretionary action.

The proposed law requires the factual underpinnings of a discretionary decision to be reviewed by the same standards for other fact-finding — substantial evidence or independent judgment¹⁰⁸ — whether the decision arose out of formal or informal adjudication, quasi-legislative action such as rule-making, or some other function.¹⁰⁹

Review of Agency Procedure

Under existing law, California courts use independent judgment on the question of whether agency action complied with procedural requirements of statutes or the constitution.¹¹⁰ California courts have occasionally mandated administrative

105. Asimow, *supra* note 80, at 1228-29.

106. Asimow, *supra* note 80, at 1229.

107. 1982 Cal. Stat. ch. 1573, § 10 (amending Gov't Code § 11350); Asimow, *supra* note 80, at 1230.

108. See discussion *supra* in text accompanying notes 89-98.

109. The proposed law rejects case law indicating that an exercise of agency discretion can be disturbed only if evidentiary support is “entirely lacking” or that review is less intensive in abuse of discretion cases than in other cases. See generally Asimow, *supra* note 80, at 1240.

110. See *California Hotel & Motel Ass'n v. Industrial Welfare Comm'n*, 25 Cal. 3d 200, 209-16, 599 P.2d 31, 36-41, 157 Cal. Rptr. 840, 845-50 (1979); *City of Fairfield v. Superior Court*, 14 Cal. 3d 768, 776, 537 P.2d 375, 379, 122 Cal. Rptr. 543, 547 (1975).

procedures not required by any statute, either in the interest of fair procedures¹¹¹ or to facilitate judicial review.¹¹²

The Commission believes that California courts should retain the power to impose administrative procedures not found in a statute. This power is necessary to prevent procedural unfairness to parties. However, while courts should continue to use independent judgment on procedural issues, they should normally accord considerable deference to agency decisions about how to implement procedural provisions in statutes. Agency expertise is just as relevant in establishing procedure as in fact-finding and determining law and policy.¹¹³

The proposed law permits the court to exercise independent judgment in reviewing agency procedures, with deference to the agency's determination of what procedures are appropriate.¹¹⁴

EVIDENCE OUTSIDE THE ADMINISTRATIVE RECORD

Under existing law, in administrative mandamus¹¹⁵ to review an adjudicative proceeding, the court may remand to

111. See, e.g., *Ettinger v. Board of Medical Quality Assurance*, 135 Cal. App. 3d 853, 185 Cal. Rptr. 601 (1982).

112. *Saleeby v. State Bar*, 39 Cal. 3d 547, 566-68, 702 P.2d 525, 536-38, 216 Cal. Rptr. 367, 378-80 (1985); *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974).

113. *Asimow*, *supra* note 80, at 1246.

114. An agency's procedural choices under a general statute applicable to a variety of agencies, such as the Administrative Procedure Act, should be entitled to less deference than a choice made under a statute unique to that agency. *Asimow*, *supra* note 80, at 1247. The proposed law provides that the standard of review of agency procedure does not apply to judicial review of state agency rulemaking under the Administrative Procedure Act. The Law Revision Commission is studying this question as part of its administrative rulemaking study.

115. Traditional mandamus is rarely, if ever, appropriate to review an adjudicative proceeding. See California Administrative Mandamus § 1.8, at 8 (Cal. Cont. Ed. Bar, 2d ed. 1989).

the agency to admit additional evidence only if in the exercise of reasonable diligence the evidence could not have been produced at, or was improperly excluded from, the administrative hearing.¹¹⁶ For independent judgment review, the court may either admit the evidence itself or remand if one of those two conditions is satisfied.¹¹⁷

In traditional mandamus to review ministerial or informal action, extra-record evidence is freely admissible if the facts are in dispute.¹¹⁸ The court simply takes evidence and determines the issues. In traditional mandamus to review quasi-legislative action, extra-record evidence is admissible only if the evidence existed before the agency decision and it was not possible in the exercise of reasonable diligence to present it at the administrative proceeding.¹¹⁹

The proposed law codifies a closed record requirement for review of agency action where the agency gave interested persons notice and an opportunity to submit oral or written comment and maintained a record or file of its proceedings. These requirements will generally be satisfied for most administrative adjudication and quasi-legislative action. If these requirements are not satisfied, the court may either receive the evidence itself or remand to the agency to do so. This will apply to most ministerial and informal action.

If the agency failed to give interested persons notice and an opportunity to submit oral or written comment, or did not maintain a record or file of its proceedings, the proposed law permits the court to remand to the agency to reconsider in light of additional evidence that in the exercise of reasonable

116. Code Civ. Proc. § 1094.5(e).

117. *Id.*

118. *Western States Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559, 575-76, 888 P.2d 1268, 38 Cal. Rptr. 2d 139, 147-48 (1995).

119. *Western States Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559, 578, 888 P.2d 1268, 38 Cal. Rptr. 2d 139, 149 (1995).

diligence could not have been produced at, or was improperly excluded from, the agency proceeding.¹²⁰ This is consistent with the agency's role as the primary factfinder and the court's role as a reviewing body. The court may receive the evidence itself without remanding the case to the agency in any of the following circumstances:

(1) The evidence is needed to decide whether those taking the agency action were improperly constituted as a decision-making body or whether there were grounds to disqualify them, whether the procedure or decisionmaking process was unlawful.

(2) The standard of review of an adjudicative proceeding is the independent judgment of the court.

(3) No hearing was held by the agency and the court finds that remand to the agency would be unlikely to result in a better record for review and the interests of economy and efficiency would be served by receiving the evidence itself.¹²¹

PROPER COURT FOR REVIEW; VENUE

Under existing law, most judicial review of agency action is in superior court.¹²² Either the Supreme Court or the court of appeal reviews decisions of the Workers' Compensation Appeals Board,¹²³ Department of Alcoholic Beverage Control,¹²⁴ and Alcoholic Beverage Control Appeals Board.¹²⁵ The court of appeal reviews decisions of the Agricultural

120. The proposed law deals only with admissibility of new evidence on issues involved in the agency proceeding. It does not limit evidence on issues unique to judicial review, such as petitioner's standing or capacity, or affirmative defenses such as laches for unreasonable delay in seeking judicial review.

121. This provision does not apply to judicial review of rulemaking.

122. Asimow, *supra* note 4, at 423.

123. Lab. Code §§ 5950, 5955.

124. Bus. & Prof. Code §§ 23090, 23090.5.

125. *Id.*

Labor Relations Board¹²⁶ and Public Employment Relations Board.¹²⁷ The proposed law does not alter this scheme.

Under existing law, venue in superior court for administrative mandamus is in the county where the cause of action arose.¹²⁸ The proposed law adds Sacramento County as an additional permissible county when a state agency is involved.¹²⁹ For judicial review of local agency action, the proposed law provides that venue is in the county of jurisdiction of the agency. This is probably not a substantive change, since the cause of action is likely to arise in the county of the local agency's jurisdiction. For judicial review of action of a nongovernmental entity,¹³⁰ the proposed law provides that venue is in the county where the entity is located.

STAYS PENDING REVIEW

Under the existing APA, an agency has power to stay its own decision.¹³¹ Whether or not the agency does so, the superior court has discretion to stay the agency action, but should

126. Lab. Code § 1160.8.

127. Gov't Code §§ 3520, 3542, 3564.

128. See Code Civ. Proc. § 393(1)(b); *Duval v. Contractors State License Bd.*, 125 Cal. App. 2d 532, 271 P.2d 194 (1954); *California Administrative Mandamus* § 8.16, at 269 (Cal. Cont. Ed. Bar, 2d ed. 1989).

129. Most state agencies have their headquarters offices in Sacramento. The Sacramento County Superior Court is likely to have or develop expertise in judicial review proceedings. The provision for venue in Sacramento County does not apply to judicial review of a decision of a private hospital board under the proposed law. The proposed law also preserves the special venue rule for review of driver's license proceedings. See Veh. Code § 13559 (licensee's county of residence).

130. See discussion *supra* in text accompanying note 29.

131. Gov't Code § 11519(b).

not impose or continue a stay if to do so would be against the public interest.¹³²

A stricter standard applies in medical, osteopathic, or chiropractic cases in which a hearing was provided under the APA. The stricter standard also applies to non-health care APA cases in which the agency head adopts the proposed decision of the administrative law judge in its entirety or adopts the decision and reduces the penalty. Under the stricter standard, a stay should not be granted unless the court is satisfied that the public interest will not suffer and the agency is unlikely to prevail ultimately on the merits.¹³³ The court may condition a stay order on the posting of a bond.

If the trial court denies the writ of mandamus and a stay is in effect, the appellate court can continue the stay.¹³⁴ If the trial court grants the writ, the agency action is stayed pending appeal unless the appellate court orders otherwise.¹³⁵

The proposed law simplifies this scheme by providing one standard regardless of the type of agency action being reviewed. Under the proposed law, the factors to be considered by the court in determining whether to grant a stay include, in addition to the public interest and the likelihood of success on the merits, the degree to which the applicant for a stay will suffer irreparable injury from denial of a stay and the

132. Code Civ. Proc. § 1094.5(g). However, the court may not prevent or enjoin the collection of any tax. Cal. Const. art. XIII, § 32.

133. See Code Civ. Proc. § 1094.5(h).

134. If a stay is in effect when a notice of appeal is filed, the stay is continued in effect by operation of law for 20 days from the filing of the notice. Code Civ. Proc. § 1094.5(g).

135. In cases not arising under the administrative mandamus statute, the trial and appellate courts presumably have their usual power to grant a stay. Asimow, *supra* note 4, at 436; see California Civil Writ Practice §§ 7.51-7.53, at 267-69 (Cal. Cont. Ed. Bar, 3d ed. 1996).

degree to which the grant of a stay would harm third parties.¹³⁶

COSTS

The proposed law consolidates and generalizes provisions on the fee for preparing a transcript and other portions of the record, recovering costs of suit by the prevailing party, and proceedings in forma pauperis.¹³⁷

136. These revisions will make the standard for granting a stay similar to the standard for granting a preliminary injunction. Asimow, *supra* note 4, at 437.

137. See Code Civ. Proc. §§ 1094.5(a), 1094.6(c); Gov't Code § 11523. The proposed law continues the existing provision in Code of Civil Procedure Section 1094.5(a) for proceedings in forma pauperis to review an adjudicative proceeding, but does not expand it to apply to review of matters other than adjudication. The proposed law also recodifies Government Code Section 800 (attorney fees where agency action was arbitrary or capricious) in the Code of Civil Procedure without substantive change.

JUDICIAL REVIEW OF AGENCY ACTION

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PROPOSED LEGISLATION

Code Civ. Proc. §§ 1120-1123.950 (added). Judicial review of agency action

SEC. _____. Title 2 (commencing with Section 1120) is added to Part 3 of the Code of Civil Procedure, to read:

TITLE 2. JUDICIAL REVIEW OF AGENCY ACTION

CHAPTER 1. GENERAL PROVISIONS

Article 1. Preliminary Provisions

§ 1120. Entities to which title applies

1120. (a) Except as provided by statute, this title governs judicial review of agency action of any of the following entities:

(1) The state, including any agency or instrumentality of the state, whether exercising executive powers or otherwise.

(2) A local agency, including a county, city, district, public authority, public agency, or other political subdivision in the state.

(3) A public corporation in the state.

(b) This title governs judicial review of a decision of a nongovernmental entity if any of the following conditions is satisfied:

(1) A statute expressly so provides.

(2) The decision is made in a proceeding to which Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code applies.

(3) The decision is made in an adjudicative proceeding required by law, is quasi-public in nature, and affects fundamental vested rights, and the proceeding is of a kind likely to result in a record sufficient for judicial review.

Comment. Section 1120 makes clear that the judicial review provisions of this title apply to actions of local agencies as well as state government. *But see* Section 1121(d) (title does not apply to judicial review of a local agency ordinance, regulation, or legislative resolution). The term “local agency” is defined in Government Code Section 54951. See Section 1121.260 & Comment. The introductory clause of Section 1120 recognizes that some proceedings are exempted by statute from application of this title. See Bus. & Prof. Code § 6089 (State Bar Court); Gov’t Code § 11420.10 (award in binding arbitration under Administrative Procedure Act); Pub. Res. Code § 25531.5 (Energy Commission); Pub. Util. Code § 1768 (Public Utilities Commission). See also Gov’t Code § 19576.1 (disciplinary decisions not subject to judicial review). This title also does not apply to proceedings where the substantive right originates in the constitution, such as inverse condemnation. See California Government Tort Liability Practice § 2.97, at 181-82 (Cal. Cont. Ed. Bar, 3d ed. 1992). See also Section 1123.160 (condition of relief).

Paragraph (1) of subdivision (b) applies this title to judicial review of a decision of a nongovernmental entity if a statute expressly so provides. For a statute applying this title to a nongovernmental entity, see Health & Safety Code § 1339.63 (adjudication by private hospital board).

Paragraph (2) of subdivision (b) recognizes that Government Code Sections 11400-11470.50 apply to some private entities. See Gov’t Code § 11410.60 [in SB 68, administrative adjudication by quasi-public entities, introduced at the 1997 session].

Paragraph (3) of subdivision (b) is drawn from a portion of the first sentence of former Section 1094.5(a) (decision made in “proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer”) and from case law on the availability of administrative mandamus to review a decision of a nongovernmental entity. See, e.g., *Anton v. San Antonio Community Hospital*, 19 Cal. 3d 802, 814, 567 P.2d 1162, 140 Cal. Rptr. 442 (1979); *Pomona College v. Superior Court*, 45 Cal. App. 4th 1716, 53 Cal. Rptr. 2d 662 (1996); *Delta Dental Plan v. Banasky*, 27 Cal. App. 4th 1598, 33 Cal. Rptr. 2d 381 (1994); *Wallin v. Vienna Sausage Mfg. Co.*, 156 Cal. App. 3d 1051, 203 Cal. Rptr. 375 (1984); *Bray v. International Molders & Allied Workers Union*, 155 Cal. App. 3d 608, 202 Cal. Rptr. 269 (1984); *Coppernoll v. Board of Directors*, 138 Cal. App. 3d 915, 188 Cal. Rptr. 394 (1983). The requirement in paragraph (3) that the proceeding be of a kind likely to result in a record sufficient for judicial review is new, and is necessary to avoid the unfairness that might result from

applying the closed record requirement of this title. See Sections 1123.810, 1123.850.

Subdivision (b) applies this title only to nongovernmental action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person, and not to quasi-legislative acts. See Section 1121.250 (“decision” defined). If this title is not available to review a decision of a nongovernmental entity because the requirements of subdivision (b) are not met, traditional mandamus may be available under Section 1085. See California Civil Writ Practice §§ 6.16-6.17, at 203-05 (Cal. Cont. Ed. Bar, 3d ed. 1996). If the person seeking review uses the wrong procedure, the court should ordinarily permit amendment of the pleadings to use the proper procedure. See, e.g., *Scott v. City of Indian Wells*, 6 Cal. 3d 541, 549-50, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972) (reversible error to sustain general demurrer to complaint for declaratory relief without leave to amend when proper remedy is administrative mandamus).

References in section Comments in this title to the “1981 Model State APA” mean the Model State Administrative Procedure Act (1981) promulgated by the National Conference of Commissioners on Uniform State Laws. See 15 U.L.A. 1 (1990).

§ 1121. Proceedings to which title does not apply

1121. This title does not apply to any of the following:

(a) Judicial review of agency action by any of the following means:

(1) Where a statute provides for trial de novo.

(2) Action for refund of taxes or fees under Section 5140 or 5148 of the Revenue and Taxation Code, or under Division 2 (commencing with Section 6001) of the Revenue and Taxation Code.

(3) Action under Division 3.6 (commencing with Section 810) of the Government Code, relating to claims and actions against public entities and public employees.

(b) Litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim.

(c) Judicial review of a decision of a court.

(d) Judicial review of either of the following enacted by a county board of supervisors or city council:

- (1) An ordinance or regulation.
- (2) A resolution that is legislative in nature.

(e) Judicial review of agency proceedings pursuant to a reference to the agency ordered by the court.

Comment. Under subdivision (a)(1) of Section 1121, this title does not apply where a statute provides for judicial review by a trial de novo. Such statutes include: Educ. Code §§ 33354 (hearing on compliance with federal law on interscholastic activities), 67137.5 (judicial review of college or university withholding student records); Food & Agric. Code § 31622 (hearing concerning vicious dog); Gov't Code § 53088.2 (judicial review of local action concerning video provider); Lab. Code §§ 98.2 (judicial review of order of Labor Commissioner on employee complaint), 1543 (judicial review of determination of Labor Commissioner involving athlete agent), 1700.44 (judicial review of order of Labor Commissioner involving talent agency); Rev. & Tax. Code § 1605.5 (change of property ownership or new construction); Welf. & Inst. Code § 5334 (judicial review of capacity hearing).

Subdivision (a)(2) exempts from this title actions for refund of taxes under Section 5140 or 5148 of, or Division 2 of, the Revenue and Taxation Code, but does not generally exempt property taxation under Division 1 of that code. This is consistent with existing law under which judicial review of a property tax assessment is not by trial de novo, but is based on the administrative record. See *Bret Harte Inn, Inc. v. City & County of San Francisco*, 16 Cal. 3d 14, 544 P.2d 1354, 127 Cal. Rptr. 154 (1976); *DeLuz Homes, Inc. v. County of San Diego*, 45 Cal. 2d 546, 290 P.2d 544 (1955); *Prudential Ins. Co. v. City & County of San Francisco*, 191 Cal. App. 3d 1142, 236 Cal. Rptr. 869 (1987); *Kaiser Center, Inc. v. County of Alameda*, 189 Cal. App. 3d 978, 234 Cal. Rptr. 603 (1987); *Trailer Train Co. v. State Bd. of Equalization*, 180 Cal. App. 3d 565, 225 Cal. Rptr. 717 (1986); *Hunt-Wesson Foods, Inc. v. County of Alameda*, 41 Cal. App. 3d 163, 116 Cal. Rptr. 160 (1974); *Westlake Farms, Inc. v. County of Kings*, 39 Cal. App. 3d 179, 114 Cal. Rptr. 137 (1974). See also Cal. Const. art. XIII, § 32 (courts may not prevent or enjoin collection of any tax).

Subdivision (a)(3) provides that this title does not apply to an action brought under the California Tort Claims Act. However, subdivision (a)(3) does not prevent the claims requirements of the Tort Claims Act from applying to an action seeking primarily money damages and also extraordinary relief incidental to the prayer for damages. See Section

1123.730(b) (damages subject to Tort Claims Act if applicable); *Eureka Teacher's Ass'n v. Board of Educ.*, 202 Cal. App. 3d 469, 474-76, 247 Cal. Rptr. 790 (1988); *Loehr v. Ventura County Community College Dist.*, 147 Cal. App. 3d 1071, 1081, 195 Cal. Rptr. 576 (1983). However, this title does apply to compel an agency to pay a claim that has been allowed and is required to be paid. Gov't Code § 942.

Under subdivision (b), this title does not apply, for example, to enforcement of a government bond in an action at law, or to actions involving contract, intellectual property, or copyright. This title does apply to denial by the Department of Health Services of a claim by a health care provider where the department has statutory authority to determine such claims. See, e.g., *Welf. & Inst. Code* §§ 14103.6, 14103.7. Judicial review of denial of such a claim is under this title and not, for example, in small claims court. See Section 1121.120 (this title provides exclusive procedure for judicial review of agency action).

Subdivision (d) provides that this title does not apply to judicial review of an ordinance or regulation of a county board of supervisors or city council, or of a resolution of those bodies that is legislative in nature. For an example of a resolution that is legislative in nature, see *Valentine v. Town of Ross*, 39 Cal. App. 3d 954, 114 Cal. Rptr. 678 (1974) (resolution approving flood control project). For examples of resolutions that are not legislative in nature, see *Simpson v. Hite*, 36 Cal. 2d 125, 222 P.2d 225 (1950) (resolution designating site for court buildings); *Burdick v. City of San Diego*, 29 Cal. App. 2d 565, 84 P.2d 1064 (1938) (resolution designating site for city jail, police headquarters, and courtrooms). Matters exempted from this title by subdivision (d) remain subject to judicial review by traditional mandamus or by an action for injunctive or declaratory relief. See, e.g., *Karlson v. City of Camarillo*, 100 Cal. App. 3d 789, 798, 161 Cal. Rptr. 260 (1980) (mandamus to review amendment of city's general plan); *cf. Guidotti v. County of Yolo*, 214 Cal. App. 3d 1552, 1561-63, 271 Cal. Rptr. 858, 863-64 (1986) (declaratory and injunctive relief and mandamus to review setting by county of levels of general relief). If a proceeding is brought under this title to review ministerial or informal action and a separate proceeding for traditional mandamus is brought to review an ordinance, regulation, or legislative resolution upon which the action is based, the two proceedings may be consolidated by the court under Section 1048. See Section 1123.710.

Subdivision (e) makes clear this title does not apply where an agency acts as referee in a court-ordered reference. See, e.g., *Water Code* §§ 2000-2048. However, notwithstanding subdivision (e), Chapter 2 (commencing with Section 1122.010) on primary jurisdiction may still apply. Section 1122.010; see generally *National Audubon Soc'y v.*

Superior Court, 33 Cal. 3d 419, 451, 658 P.2d 709, 731, 189 Cal. Rptr. 346, 368, *cert. denied*, 464 U.S. 977 (1983); *Environmental Defense Fund v. East Bay Mun. Util. Dist.*, 26 Cal. 3d 183, 193-200, 605 P.2d 1, 5-9, 161 Cal. Rptr. 466, 470-74 (1980). See also Water Code § 2504 (title does not apply to statutory adjudication under specified Water Code provisions).

§ 1121.110. Conflicting or inconsistent statute controls

1121.110. A statute applicable to a particular entity or a particular agency action prevails over a conflicting or inconsistent provision of this title.

Comment. Section 1121.110 is drawn from the first sentence of former Government Code Section 11523 (judicial review in accordance with provisions of Code of Civil Procedure “subject, however, to the statutes relating to the particular agency”). As used in Section 1121.110, “statute” does not include a local ordinance. See Cal. Const. art. IV, § 8(b) (statute enacted only by bill in the Legislature); *id.* art. XI, § 7 (local ordinance).

§ 1121.120. Other forms of judicial review replaced

1121.120. (a) The procedure provided in this title for judicial review of agency action is a proceeding for extraordinary relief in the nature of mandamus and shall be used in place of administrative mandamus, ordinary mandamus, certiorari, prohibition, declaratory relief, injunctive relief, and any other judicial procedure, to the extent those procedures might otherwise be used for judicial review of agency action.

(b) Nothing in this title limits use of the writ of habeas corpus.

(c) Notwithstanding Section 427.10, no cause of action may be joined in a proceeding under this title unless it states independent grounds for relief.

Comment. Subdivision (a) of Section 1121.120 is drawn from 1981 Model State APA Section 5-101. By establishing this title as the exclusive method for judicial review of agency action, Section 1121.120 continues and broadens the effect of former Section 1094.5. See, e.g., *Viso v. State*, 92 Cal. App. 3d 15, 21, 154 Cal. Rptr. 580, 584 (1979).

Subdivision (a) implements the original writ jurisdiction given by Article VI, Section 10, of the California Constitution (original jurisdiction for extraordinary relief in the nature of mandamus). Nothing in this title limits the original writ jurisdiction of the courts. See Section 1123.510(b).

Under subdivision (b), this title does not apply to the writ of habeas corpus. See Cal. Const. art. I, § 11, art. VI, § 10. See also *In re McVickers*, 29 Cal. 2d 264, 176 P.2d 40 (1946); *In re Stewart*, 24 Cal. 2d 344, 149 P.2d 689 (1944); *In re DeMond*, 165 Cal. App. 3d 932, 211 Cal. Rptr. 680 (1985).

Subdivision (c) continues prior law. See, e.g., *State v. Superior Court*, 12 Cal. 3d 237, 249-51, 524 P.2d 1281, 115 Cal. Rptr. 497, 504 (1974) (declaratory relief not appropriate to review administrative decision, but is appropriate to declare a statute facially unconstitutional); *Hensler v. City of Glendale*, 8 Cal. 4th 1, 876 P.2d 1043, 32 Cal. Rptr. 2d 244, 253 (1994) (inverse condemnation action may be joined in administrative mandamus proceeding involving same facts); *Mata v. City of Los Angeles*, 20 Cal. App. 4th 141, 147-48, 24 Cal. Rptr. 2d 314, 318 (1993) (complaint for violation of civil rights may be joined with administrative mandamus). If other causes of action are joined with a proceeding for judicial review, the court may sever the causes for trial. See Section 1048. See also Section 598.

Nothing in this section limits the type of relief or remedial action available in a proceeding under this title. See Section 1123.730 (type of relief).

§ 1121.130. Injunctive relief ancillary

1121.130. Injunctive relief is ancillary to and may be used as a supplemental remedy in connection with a proceeding under this title.

Comment. Section 1121.130 makes clear that the procedures for injunctive relief may be used in a proceeding under this title. See also Section 1123.730 (injunctive relief authorized).

§ 1121.140. Exercise of agency discretion

1121.140. Nothing in this title authorizes the court to interfere with a valid exercise of agency discretion or to direct an agency how to exercise its discretion.

Comment. Section 1121.140 is drawn from 1981 Model State APA Section 1-116(c)(8)(i), and is consistent with the last clause in former Section 1094.5(f).

§ 1121.150. Application of new law

1121.150. (a) This title applies to a proceeding commenced on or after January 1, 1998, for judicial review of agency action.

(b) The applicable law in effect before January 1, 1998, continues to apply to a proceeding for judicial review of agency action pending on January 1, 1998.

Comment. Subdivision (a) of Section 1121.150 applies this title to a proceeding commenced on or after the operative date.

Subdivision (b) is drawn from a portion of 1981 Model State APA Section 1-108. Pending proceedings for administrative mandamus, declaratory relief, and other proceedings for judicial review of agency action are not governed by this title, but should be completed under the applicable provisions other than this title.

Article 2. Definitions

§ 1121.210. Application of definitions

1121.210. Unless the provision or context requires otherwise, the definitions in this article govern the construction of this title.

Comment. Section 1121.210 limits these definitions to judicial review of agency action. Some parallel provisions may be found in the statutes governing adjudicative proceedings by state agencies. See Gov't Code §§ 11405.10-11405.80 (operative July 1, 1997).

§ 1121.220. Adjudicative proceeding

1121.220. "Adjudicative proceeding" means an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision.

Comment. Section 1121.220 is drawn from the Administrative Procedure Act. See Gov't Code § 11405.20 (operative July 1, 1997) & Comment ("adjudicative proceeding" defined). See also Sections 1121.230 ("agency" defined), 1121.250 ("decision" defined).

§ 1121.230. Agency

1121.230. (a) “Agency” means a board, bureau, commission, department, division, governmental subdivision or unit of a governmental subdivision, office, officer, or other administrative unit, including the agency head, and one or more members of the agency head or agency employees or other persons directly or indirectly purporting to act on behalf of or under the authority of the agency head.

(b) When this title applies to judicial review of a decision of a nongovernmental entity, “agency” includes that entity.

Comment. Section 1121.230 is drawn from the Administrative Procedure Act. See Gov’t Code § 11405.30 (operative July 1, 1997) & Comment (“agency” defined). Subdivision (a) is broadly drawn to subject all governmental units to this title unless expressly excepted by statute. See Comment to Section 1120.

§ 1121.240. Agency action

1121.240. “Agency action” means any of the following:

(a) The whole or a part of a rule or a decision.

(b) The failure to issue a rule or a decision.

(c) An agency’s performance of any other duty, function, or activity, discretionary or otherwise.

(d) An agency’s failure to perform any duty, function, or activity, discretionary or otherwise, that the law requires to be performed or that would be an abuse of discretion if not performed.

Comment. Section 1121.240 is drawn from 1981 Model State APA Section 1-102(2). The term “agency action” includes a “rule” and a “decision” defined in Sections 1121.290 (rule) and 1121.250 (decision), and an agency’s failure to issue a rule or decision. It goes further, however. Subdivisions (c) and (d) make clear that “agency action” includes everything and anything else that an agency does or does not do, whether its action or inaction is discretionary or otherwise. There are no exclusions from that all-encompassing definition. As a consequence, there is a category of “agency action” that is neither a “decision” nor a “rule” because it neither establishes the legal rights of any particular person nor establishes law or policy of general applicability. See also

Section 1123.110(b) (court may summarily decline to grant review if petition does not present substantial issue).

The principal effect of the broad definition of “agency action” is that everything an agency does or does not do is subject to judicial review if the limitations provided in Chapter 3 (commencing with Section 1123.110) are satisfied. See Section 1123.110 (requirements for judicial review). Success on the merits in such cases, however, is another thing. See also Sections 1121.230 (“agency” defined), 1123.160 (condition of relief).

§ 1121.250. Decision

1121.250. “Decision” means an agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person.

Comment. Section 1121.250 is drawn from the Administrative Procedure Act. See Gov’t Code § 11405.50 (operative July 1, 1997) & Comment (“decision” defined). See also Sections 1121.240 (“agency action” defined), 1121.280 (“person” defined).

§ 1121.260. Local agency

1121.260. “Local agency” means “local agency” as defined in Section 54951 of the Government Code.

Comment. Section 1121.260 is drawn from former Section 1094.6, and is broadened to include school districts. Under Government Code Section 54951, “local agency” means “a county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission or agency thereof, or other local public agency.” See also Section 1121.230 (“agency” defined).

§ 1121.270. Party

1121.270. (a) As it relates to agency proceedings, “party” means the agency that is taking action, the person to which the agency action is directed, and any other person named as a party or allowed to appear or intervene in the agency proceedings.

(b) As it relates to judicial review proceedings, “party” means the person seeking judicial review of agency action

and any other person named as a party or allowed to participate as a party in the judicial review proceedings.

Comment. Subdivision (a) of Section 1121.270 is drawn from the Administrative Procedure Act. See Gov't Code § 11405.60 (operative July 1, 1997) & Comment ("party" defined). This section does not address the question of whether a person is entitled to judicial review. Standing to obtain judicial review is dealt with in Article 2 (commencing with Section 1123.210) of Chapter 3. See also Section 1121.230 ("agency" defined).

§ 1121.280. Person

1121.280. "Person" includes an individual, partnership, corporation, governmental subdivision or unit of a governmental subdivision, or public or private organization or entity of any character.

Comment. Section 1121.280 is drawn from the Administrative Procedure Act. See Gov't Code § 11405.70 (operative July 1, 1997) & Comment ("person" defined). It supplements the definition in Code of Civil Procedure Section 17 and is broader in its application to a governmental subdivision or unit. This includes an agency other than the agency against which rights under this title are asserted by the person. Inclusion of such agencies and units of government insures, therefore, that other agencies or other governmental bodies will be accorded all the rights that a person has under this title.

§ 1121.290. Rule

1121.290. "Rule" means the whole or a part of an agency regulation, including a "regulation" as defined in Section 11342 of the Government Code, order, or standard of general applicability that implements, interprets, makes specific, or prescribes law or policy, or the organization, procedure, or practice requirements of an agency, except one that relates only to the internal management of the agency. The term includes the amendment, supplement, repeal, or suspension of an existing rule.

Comment. Section 1121.290 is drawn from 1981 Model State APA Section 1-102(10) and Government Code Section 11342(g). The definition includes all agency orders of general applicability that

implement, interpret, or prescribe law or policy, without regard to the terminology used by the issuing agency to describe them. The exception for an agency standard that relates only to the internal management of the agency is drawn from Government Code Section 11342(g), and is generalized to apply to local agencies. See also Sections 1121 (this title does not apply to local agency ordinance), 1121.230 (“agency” defined), 1121.260 (“local agency” defined).

This title applies to an agency rule whether or not the rule is a “regulation” to which the rulemaking provisions of the Administrative Procedure Act apply.

CHAPTER 2. PRIMARY JURISDICTION

§ 1122.010. Application of chapter

1122.010. Notwithstanding Section 1121, this chapter applies if a judicial proceeding is pending and the court determines that an agency has exclusive or concurrent jurisdiction over the subject matter of the proceeding or an issue in the proceeding.

Comment. Section 1122.010 makes clear that the provisions governing primary jurisdiction come into play only when there is exclusive or concurrent jurisdiction in an agency over a matter that is the subject of a pending judicial proceeding. The introductory clause makes clear this chapter applies, for example, to a judicial proceeding involving a trial de novo. The term “judicial proceeding” is used to mean any proceeding in court, including a civil action or a special proceeding.

This chapter deals with original jurisdiction over a matter, rather than with judicial review of previous agency action on the matter. If the matter has previously been the subject of agency action and is currently the subject of judicial review, the governing provisions relating to the court’s jurisdiction are found in Chapter 3 (commencing with Section 1123.110) (judicial review) rather than in this chapter.

§ 1122.020. Exclusive agency jurisdiction

1122.020. If an agency has exclusive jurisdiction over the subject matter of the proceeding or an issue in the proceeding, the court shall decline to exercise jurisdiction over the subject matter or the issue. The court may dismiss the proceeding or

retain jurisdiction pending agency action on the matter or issue.

Comment. Section 1122.020 requires the court to yield primary jurisdiction to an agency if there is a legislative scheme to vest the determination in the agency. Adverse agency action is subject to judicial review. See Section 1122.040 (judicial review following agency action).

§ 1122.030. Concurrent agency jurisdiction

1122.030. (a) If an agency has concurrent jurisdiction over the subject matter of the proceeding or an issue in the proceeding, the court shall exercise jurisdiction over the subject matter or issue unless the court in its discretion refers the matter or issue for agency action. The court may exercise its discretion to refer the matter or issue for agency action if the court determines the reference is appropriate taking into consideration all relevant factors including, but not limited to, the following:

(1) Whether agency expertise is important for proper resolution of a highly technical matter or issue.

(2) Whether the area is so pervasively regulated by the agency that the regulatory scheme should not be subject to judicial interference.

(3) Whether there is a need for uniformity that would be jeopardized by the possibility of conflicting judicial decisions.

(4) Whether there is a need for immediate resolution of the matter, and any delay that would be caused by referral for agency action.

(5) The costs to the parties of additional administrative proceedings.

(6) Whether agency remedies are adequate and whether any delay for agency action would limit judicial remedies, either practically or due to running of statutes of limitation or otherwise.

(7) Any legislative intent to prefer cumulative remedies or to prefer administrative resolution.

(b) This section does not apply to a criminal proceeding.

(c) Nothing in this section confers concurrent jurisdiction on a court over the subject matter of a pending disciplinary proceeding under the Administrative Procedure Act, Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

Comment. Section 1122.030 codifies the court's broad discretion to refer the matter or an issue to an agency for action if there is concurrent jurisdiction. See, e.g., *Farmers Ins. Exch. v. Superior Court*, 2 Cal. 4th 377, 391-92, 826 P.2d 730, 6 Cal. Rptr. 2d 487, 496 (1992). See generally Asimow, *Judicial Review: Standing and Timing*, 27 Cal. L. Revision Comm'n Reports 229, 281-93 (1997).

Court retention of jurisdiction does not preclude agency involvement. For example, the court in its discretion may request that the agency file an amicus brief setting forth its views on the matter as an alternative to referring the matter to the agency. If the matter is referred to the agency, the agency action remains subject to judicial review. Section 1122.040 (judicial review following agency action).

§ 1122.040. Judicial review following agency action

1122.040. If an agency has exclusive or concurrent jurisdiction over the subject matter of the proceeding or an issue in the proceeding, agency action on the matter or issue is subject to judicial review to the extent provided in Chapter 3 (commencing with Section 1123.110).

Comment. Section 1122.040 makes clear that judicial review principles apply to agency action even though an agency has exclusive jurisdiction or the court refers a matter of concurrent jurisdiction to the agency for action under this chapter.

CHAPTER 3. JUDICIAL REVIEW

Article 1. General Provisions

§ 1123.110. Requirements for judicial review

1123.110. (a) Subject to subdivision (b), a person who has standing under this chapter and who satisfies the requirements

governing exhaustion of administrative remedies, ripeness, time for filing, and other preconditions is entitled to judicial review of final agency action.

(b) The court may summarily decline to grant judicial review if the petition for review does not present a substantial issue for resolution by the court.

Comment. Subdivision (a) of Section 1123.110 is drawn from 1981 Model State APA Section 5-102(a). It ties together the threshold requirements for obtaining judicial review of final agency action, and guarantees the right to judicial review if these requirements are met. See, e.g., Sections 1123.120 (finality), 1123.130 (judicial review of agency rule), 1123.210 (standing), 1123.310 (exhaustion of administrative remedies), 1123.630-1123.640 (time for filing petition for review of decision in adjudicative proceeding).

The term “agency action” is defined in Section 1121.240. The term includes rules, decisions, and other types of agency action and inaction. This chapter contains provisions for judicial review of all types of agency action.

Subdivision (b) continues the former discretion of the courts to decline to grant a writ of administrative mandamus. *Parker v. Bowron*, 40 Cal. 2d 344, 351, 254 P.2d 6, 9 (1953); *Dare v. Board of Medical Examiners*, 21 Cal. 2d 790, 796, 136 P.2d 304, 308 (1943); *Berry v. Coronado Bd. of Educ.*, 238 Cal. App. 2d 391, 397, 47 Cal. Rptr. 727 (1965); California Administrative Mandamus § 1.3, at 5 (Cal. Cont. Ed. Bar, 2d ed. 1989). See also Section 1121.120 (judicial review as proceeding for extraordinary relief in the nature of mandamus).

§ 1123.120. Finality

1123.120. A person may not obtain judicial review of agency action unless the agency action is final.

Comment. Section 1123.120 continues the finality requirement of former Section 1094.5(a) in language drawn from 1981 Model State APA Section 5-102(b)(2). Agency action is typically not final if the agency intends the action to be preliminary, preparatory, procedural, or intermediate with regard to subsequent action of that agency or another agency. For example, state agency action concerning a proposed rule subject to the rulemaking part of the Administrative Procedure Act is not final until the agency submits the proposed rule to the Office of Administrative Law for review as provided by that act, and the Office of Administrative Law approves the rule pursuant to Government Code

Section 11349.3. See also Section 1123.130 (rulemaking may not be enjoined or prohibited, and rule may not be reviewed until it has been applied).

For an exception to the requirement of finality, see Section 1123.140.

§ 1123.130. Judicial review of agency rule

1123.130. (a) Notwithstanding any other provision of law, a court may not enjoin or otherwise prohibit an agency from adopting a rule.

(b) A person may not obtain judicial review of an agency rule until the rule has been applied by the agency.

Comment. Subdivision (a) of Section 1123.130 continues *State Water Resources Control Bd. v. Office of Admin. Law*, 12 Cal. App. 4th 697, 707-08, 16 Cal. Rptr. 2d 25, 31-32 (1993). Subdivision (a) prohibits, for example, a court from enjoining a state agency from holding a public hearing or otherwise proceeding to adopt a proposed rule on the ground that the notice was legally defective. Similarly, subdivision (a) prohibits a court from enjoining the Office of Administrative Law from reviewing or approving a proposed rule that has been submitted by a regulatory agency pursuant to Government Code Section 11343(a). A rule is subject to judicial review after it is adopted. See Sections 1120, 1123.110. See also Section 1123.140 (rule must be fit for immediate judicial review).

Subdivision (b) codifies the case law ripeness requirement for judicial review of an agency rule. See, e.g., *Pacific Legal Foundation v. California Coastal Comm'n*, 33 Cal. 3d 158, 655 P.2d 306, 188 Cal. Rptr. 104 (1982). See also Section 1121.290 (“rule” defined). For an exception to the requirement of ripeness, see Section 1123.140. An allegation that procedures followed in adopting a state agency rule were legally deficient would not be ripe for judicial review until the agency completes the rulemaking process and formally adopts the rule (typically by submitting it to the Office of Administrative Law pursuant to Government Code Section 11343), the Office of Administrative Law approves the rule and submits it to the Secretary of State pursuant to Government Code Section 11349.3 thus allowing it to become final, and the adopting agency applies the rule.

§ 1123.140. Exception to finality and ripeness requirements

1123.140. Notwithstanding Sections 1123.120 and 1123.130, a person may obtain judicial review of agency action that is not final or, in the case of an agency rule, that

has not been applied by the agency, if all of the following conditions are satisfied:

(a) It appears likely that the person will be able to obtain judicial review of the agency action when it becomes final or, in the case of an agency rule, when it has been applied by the agency.

(b) The issue is fit for immediate judicial review.

(c) Postponement of judicial review would result in an inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement.

Comment. Section 1123.140 codifies an exception to the finality and ripeness requirements in language drawn from 1981 Model State APA Section 5-103. An issue is fit for immediate judicial review if it is primarily legal rather than factual in nature and can be adequately reviewed in the absence of concrete application by the agency. Under this language the court must assess and balance the fitness of the issues for immediate judicial review, the hardship to the person from deferring review, and the public interest in granting or deferring review. See, e.g., *BKHN, Inc. v. Department of Health Servs.*, 3 Cal. App. 4th 301, 4 Cal. Rptr. 2d 188 (1992); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

§ 1123.150. Proceeding not moot because penalty completed

1123.150. A proceeding under this chapter is not made moot by satisfaction during the pendency of the proceeding of a penalty imposed by the agency.

Comment. Section 1123.150 continues the substance of the seventh sentence of former Section 1094.5(g) and the fourth sentence of former Section 1094.5(h)(3).

§ 1123.160. Condition of relief

1123.160. (a) The court may grant relief under this chapter only on grounds specified in Article 4 (commencing with Section 1123.410) for reviewing agency action.

(b) The court may grant relief under this chapter from procedural error only if the error was prejudicial.

Comment. Subdivision (a) of Section 1123.160 is drawn from 1981 Model State APA Section 5-116(c) (introductory clause). It supersedes the provision in former Section 1094.5(b) that the inquiry in an administrative mandamus case is whether the agency proceeded without or in excess of jurisdiction, whether there was a fair trial, and whether there was any prejudicial abuse of discretion. The grounds for review of agency action under Article 4 are the following (see Sections 1123.420-1123.460):

- (1) Whether the agency has erroneously interpreted the law.
- (2) Whether agency action is based on an erroneous determination of fact made or implied by the agency.
- (3) Whether agency action is a proper exercise of discretion.
- (4) Whether the agency has engaged in an unlawful procedure or decisionmaking process, or has failed to follow prescribed procedure.
- (5) Whether the persons taking the agency action were improperly constituted as a decisionmaking body or subject to disqualification.

Subdivision (b) is drawn from Government Code Section 65010 (planning and zoning law).

Article 2. Standing

§ 1123.210. No standing unless authorized by statute

1123.210. A person does not have standing to obtain judicial review of agency action unless standing is conferred by this article or is otherwise expressly provided by statute.

Comment. Section 1123.210 states the intent of this article to override existing case law standing principles and to replace them with the statutory standards prescribed in this article. Other statutes conferring standing include Public Resources Code Section 30801 (judicial review of decision of Coastal Commission by “any aggrieved person”).

This title provides a single judicial review procedure for all types of agency action. See Section 1121.120. The provisions on standing therefore accommodate persons who seek judicial review of the entire range of agency actions, including rules, decisions, and other action or inaction. See Section 1121.240 (“agency action” defined).

§ 1123.220. Private interest standing

1123.220. An interested person has standing to obtain judicial review of agency action. For the purpose of this section, a person is not interested by the mere filing of a

complaint with the agency where the complaint is not authorized by statute or ordinance.

Comment. Section 1123.220 governs private interest standing for judicial review of agency action other than adjudication. For special rules governing standing for judicial review of a decision in an adjudicative proceeding, see Section 1123.240. See also Section 1121.240 (“agency action” defined). The provision that an “interested” person has standing is drawn from the law governing writs of mandate, and from the law governing judicial review of state agency regulations. See, e.g., Code Civ. Proc. §§ 1060 (interested person may obtain declaratory relief), 1069 (party beneficially interested may obtain writ of review), 1086 (party beneficially interested may obtain writ of mandate); Gov’t Code § 11350(a) (interested person may obtain judicial declaration on validity of state agency regulation); *cf.* Code Civ. Proc. § 902 (appeal by party aggrieved). This requirement continues case law that a person must suffer some harm from the agency action in order to have standing to obtain judicial review of the action on a basis of private, as opposed to public, interest. See, e.g., *Sperry & Hutchinson Co. v. California State Bd. of Pharmacy*, 241 Cal. App. 2d 229, 50 Cal. Rptr. 489 (1966); *Silva v. City of Cypress*, 204 Cal. App. 2d 374, 22 Cal. Rptr. 453 (1962). A plaintiff’s private interest is sufficient to confer standing if that interest is over and above that of members of the general public. *Carsten v. Psychology Examining Comm.*, 27 Cal. 3d 793, 796, 614 P.2d 276, 166 Cal. Rptr. 844 (1980). Non-pecuniary injuries, such as environmental or aesthetic claims, are sufficient to satisfy the private interest test. *Bozung v. Local Agency Formation Comm’n*, 13 Cal. 3d 263, 529 P.2d 1017, 118 Cal. Rptr. 249 (1975); *Albion River Watershed Protection Ass’n v. Department of Forestry*, 235 Cal. App. 3d 358, 286 Cal. Rptr. 573 (1991); *Kane v. Redevelopment Agency of Hidden Hills*, 179 Cal. App. 3d 899, 224 Cal. Rptr. 922 (1986); *Citizens Ass’n for Sensible Development v. County of Inyo*, 172 Cal. App. 3d 151, 217 Cal. Rptr. 893 (1985). See generally Asimow, *Judicial Review: Standing and Timing*, 27 Cal. L. Revision Comm’n Reports 229, 236-38 (1997).

Section 1123.220 merely requires that a person be “interested” to seek judicial review. Thus if a person has sufficient interest in the subject matter, the person may seek judicial review even though the person did not personally participate in the agency proceeding. See *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 267-68, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972). However, in most cases the exhaustion of remedies rule requires the issue to be reviewed to have been raised before the agency by someone. See Section 1123.350.

Standing of a person to obtain judicial review under this section is not limited to private persons, but extends to public entities as well, whether state or local. See Section 1121.280 (“person” includes governmental subdivision). See also Bus. & Prof. Code § 23090 (Department of Alcoholic Beverage Control may get judicial review of decision of Alcoholic Beverage Control Appeals Board); *Martin v. Alcoholic Beverage Control Appeals Bd.*, 52 Cal. 2d 238, 243, 340 P.2d 1, 4 (1959) (same); Veh. Code § 3058 (DMV may get judicial review of order of New Motor Vehicle Board); *Tieberg v. Superior Court*, 243 Cal. App. 2d 277, 283, 52 Cal. Rptr. 33, 37 (1966) (Director of Department of Employment may get judicial review of decision of Unemployment Insurance Appeals Board, a division of that department); *Los Angeles County Dep’t of Health Servs. v. Kennedy*, 163 Cal. App. 3d 799, 209 Cal. Rptr. 595 (1984) (county department of health services may get judicial review of decision of county civil service commission); *County of Los Angeles v. Tax Appeals Bd. No. 2*, 267 Cal. App. 2d 830, 834, 73 Cal. Rptr. 469, 471 (1968) (county may get judicial review of tax appeals board decision); *County of Contra Costa v. Social Welfare Bd.*, 199 Cal. App. 2d 468, 471, 18 Cal. Rptr. 573, 575 (1962) (county may get judicial review of State Social Welfare Board decision ordering county to reinstate welfare benefits); *Board of Permit Appeals v. Central Permit Bureau*, 186 Cal. App. 2d 633, 9 Cal. Rptr. 83 (1960) (local permit appeals board may get traditional mandamus against inferior agency that did not comply with its decision). *But cf.* *Star-Kist Foods, Inc. v. County of Los Angeles*, 42 Cal. 3d 1, 719 P.2d 987, 227 Cal. Rptr. 391 (1986) (city or county standing to challenge state action as violating federal constitutional rights).

If a person is authorized by statute or ordinance to file a complaint with the agency and the complaint is rejected, the person is “interested” within the meaning of Section 1123.220. *Covert v. State Bd. of Equalization*, 29 Cal. 2d 125, 130, 173 P.2d 545 (1946). See also *Spear v. Board of Medical Examiners*, 146 Cal. App. 2d 207, 303 P.2d 886 (1956) (standing to challenge agency refusal to file charges of person expressly authorized by statute to file complaint).

§ 1123.230. Public interest standing

1123.230. Whether or not a person has standing under Section 1123.220, a person has standing to obtain judicial review of agency action that concerns an important right affecting the public interest if all of the following conditions are satisfied:

(a) The person resides or conducts business in the jurisdiction of the agency or is an organization that has a member that resides or conducts business in the jurisdiction of the agency and the agency action is germane to the purposes of the organization.

(b) The person will adequately protect the public interest.

(c) The person has previously requested the agency to correct the agency action and the agency has not, within a reasonable time, done so. The request shall be in writing unless made orally on the record in the agency proceeding. The agency may by rule require the request to be directed to the proper agency official. As used in this subdivision, a reasonable time shall not be less than 30 days unless the request shows that a shorter period is required to avoid irreparable harm. This subdivision does not apply to judicial review of an agency rule.

Comment. Section 1123.230 governs public interest standing for judicial review of agency action other than adjudication. For special rules governing standing for judicial review of a decision in an adjudicative proceeding, see Section 1123.240. See also Section 1121.240 (“agency action” defined).

Section 1123.230 codifies California case law that a member of the public may obtain judicial review of agency action (or inaction) to implement the public right to enforce a public duty. See, e.g., *Green v. Obledo*, 29 Cal. 3d 126, 144-45, 624 P.2d 256, 172 Cal. Rptr. 206 (1981); *Hollman v. Warren*, 32 Cal. 2d 351, 196 P.2d 562 (1948); *Board of Social Welfare v. County of Los Angeles*, 27 Cal. 2d 98, 162 P.2d 627 (1945); *California Homeless & Housing Coalition v. Anderson*, 31 Cal. App. 4th 450, 37 Cal. Rptr. 2d 639 (1995); *Environmental Law Fund, Inc. v. Town of Corte Madera*, 49 Cal. App. 3d 105, 122 Cal. Rptr. 282 (1975); *American Friends Serv. Comm. v. Procnunier*, 33 Cal. App. 3d 252, 109 Cal. Rptr. 22 (1973).

Section 1123.230 supersedes the standing rules of Section 526a (taxpayer actions). Under Section 1123.230 a person, whether or not a taxpayer within the jurisdiction, has standing to obtain judicial review, including restraining and preventing illegal expenditure or injury by a public entity, if the general public interest requirements of this section are satisfied.

Section 1123.230 applies to all types of relief sought, whether pecuniary or nonpecuniary, injunctive or declaratory, or otherwise. The test for standing under this section is whether there is a duty owed to the general public or a large class of persons. A person may have standing under the section to have the law enforced in the public interest, regardless of any private interest or personal adverse effect.

The limitations in subdivisions (a)-(c) are drawn loosely from other provisions of state and federal law. See, e.g., Section 1021.5 (attorney fees in public interest litigation); Section 1123.220 & Comment (private interest standing); first portion of Section 526a (taxpayer within jurisdiction); Corp. Code § 800(b)(2) (allegation in shareholder derivative action of efforts to secure action from board); Fed. R. Civ. Proc. 23(a) (representative must fairly and adequately protect interests of class). The requirement in subdivision (c) of a request to the agency does not supersede the California Environmental Quality Act. See Section 1121.110 (conflicting or inconsistent statute controls); Pub. Res. Code § 21177 (objection may be oral or written). Nor does the requirement in subdivision (c) of notice to the agency excuse exhaustion of administrative remedies under Sections 1123.310-1123.350, consistent with prior public interest standing cases. See, e.g., *Sea & Sage Audubon Soc'y, Inc. v. Planning Comm'n*, 34 Cal. 3d 412, 417-18, 668 P.2d 664, 194 Cal. Rptr. 357 (1983); *California Aviation Council v. County of Amador*, 200 Cal. App. 3d 337, 341-42, 246 Cal. Rptr. 110 (1988).

§ 1123.240. Standing for review of decision in adjudicative proceeding

1123.240. Notwithstanding Sections 1123.220 and 1123.230, a person does not have standing to obtain judicial review of a decision in an adjudicative proceeding unless one of the following conditions is satisfied:

(a) The person was a party to the proceeding.

(b) The person (1) was a participant in the proceeding and is either interested or the person's participation was authorized by statute or ordinance, or (2) has standing under Section 1123.230. This subdivision does not apply to judicial review of a proceeding under the formal hearing provisions of the Administrative Procedure Act, Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

Comment. Section 1123.240 provides special rules for standing to obtain judicial review of a decision in an adjudicative proceeding. Standing to obtain judicial review of other agency actions is governed by Sections 1123.220 (private interest standing) and 1123.230 (public interest standing). Special statutes governing standing requirements for judicial review of an agency decision prevail over this section. Section 1123.210 (standing expressly provided by statute); see, e.g., Pub. Res. Code § 30801 (judicial review of decision of Coastal Commission by “any aggrieved person”).

Subdivision (a) governs standing to challenge a decision in an adjudicative proceeding under the Administrative Procedure Act. The provision is thus limited primarily to a state agency adjudication where an evidentiary hearing for determination of facts is statutorily or constitutionally required for formulation and issuance of a decision. See Gov’t Code §§ 11410.10-11410.50 (application of administrative adjudication provisions of Administrative Procedure Act) (operative July 1, 1997).

A party to an adjudicative proceeding under the Administrative Procedure Act includes the person to whom the agency action is directed and any other person named as a party or allowed to intervene in the proceeding. Section 1121.270 (“party” defined). This codifies existing law. See, e.g., *Temescal Water Co. v. Department of Public Works*, 44 Cal. 2d 90, 279 P.2d 1 (1955); *Covert v. State Bd. of Equalization*, 29 Cal. 2d 125, 173 P.2d 545 (1946). Under this test, a complainant or victim who is not made a party does not have standing. A nonparty who might otherwise have private or public interest standing under Section 1123.220 or 1123.230 would not have standing to obtain judicial review of a decision under the Administrative Procedure Act.

Subdivision (b) applies to a decision in an adjudicative proceeding other than a proceeding subject to the Administrative Procedure Act. Under this provision, a person does not have standing to obtain judicial review unless the person (1) was a participant in the proceeding and is either “interested” or participated as authorized by statute or ordinance, or (2) has public interest standing under Section 1123.230. Participation may include appearing and testifying, submitting written comments, or other appropriate activity that indicates a direct involvement in the agency action. Giving standing to a participant who satisfies the requirements for public interest standing is consistent with *Environmental Law Fund, Inc. v. Town of Corte Madera*, 49 Cal. App. 3d 105, 114, 122 Cal. Rptr. 282 (1975). Thus a person may have public interest standing for judicial review of adjudication if the right to be vindicated is an important one affecting the public interest, the person resides or conducts business in the jurisdiction of the agency or meets the

requirements for organizational standing, the person will adequately protect the public interest, and the person has requested the agency to correct the action and the agency has not done so within a reasonable time. Section 1123.230. Moreover, the requirement of exhaustion of administrative remedies must be satisfied, including the rule that the issue on judicial review must have been raised before the agency by someone. Section 1123.350. See also *See & Sage Audubon Soc’y v. Planning Comm’n*, 34 Cal. 3d 412, 417-18, 668 P.2d 664, 194 Cal. Rptr. 357 (1983); *California Aviation Council v. County of Amador*, 200 Cal. App. 3d 337, 246 Cal. Rptr. 110 (1988); *Resource Defense Fund v. Local Agency Formation Comm’n*, 191 Cal. App. 3d 886, 895, 236 Cal. Rptr. 794, 799 (1987).

§ 1123.250. Organizational standing

1123.250. An organization that does not otherwise have standing under this article has standing if a person who has standing is a member of the organization, or a nonmember the organization is required to represent, and the agency action is related to the purposes of the organization, and the person consents.

Comment. Section 1123.250 codifies case law giving an incorporated or unincorporated association, such as a trade union or neighborhood association, standing to obtain judicial review on behalf of its members. See, e.g., *Professional Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal. 2d 276, 384 P.2d 158, 32 Cal. Rptr. 830 (1963); *Residents of Beverly Glen, Inc. v. City of Los Angeles*, 34 Cal. App. 3d 117, 109 Cal. Rptr. 724 (1973). This principle extends to standing of the organization to obtain judicial review where a nonmember is adversely affected, as where a trade union is required to represent the interests of nonmembers.

Article 3. Exhaustion of Administrative Remedies

§ 1123.310. Exhaustion required

1123.310. A person may obtain judicial review of agency action only after exhausting all administrative remedies available within the agency whose action is to be reviewed and within any other agency authorized to exercise administrative review, unless judicial review before that time

is permitted by this article or otherwise expressly provided by statute.

Comment. Section 1123.310 codifies the exhaustion of remedies doctrine of existing law. See, e.g., *Abelleira v. District Court of Appeal*, 17 Cal. 2d 280, 109 P.2d 942 (1941) (exhaustion requirement jurisdictional). Exceptions to the exhaustion requirement are stated in other provisions of this article. See Sections 1123.340 (exceptions to exhaustion of administrative remedies), 1123.350 (exact issue rule).

This chapter does not provide an exception from the exhaustion requirement for judicial review of an administrative law judge's denial of a continuance. *Cf.* former subdivision (c) of Gov't Code § 11524. Nor does it provide an exception for discovery decisions. *Cf.* *Shively v. Stewart*, 65 Cal. 2d 475, 421 P.2d 65, 55 Cal. Rptr. 217 (1966). This chapter does not continue the exemption found in the cases for a local tax assessment alleged to be a nullity. *Cf.* *Stenocord Corp. v. City & County of San Francisco*, 2 Cal. 3d 984, 471 P.2d 966, 88 Cal. Rptr. 166 (1970). Judicial review of such matters should not occur until conclusion of administrative proceedings.

This chapter does not require a person seeking judicial review of a rule to have participated in the rulemaking proceeding on which the rule is based. Section 1123.330. However, this chapter does prohibit judicial review of proposed regulations (see Section 1123.130), regulations that have been preliminarily adopted but are not yet final (Section 1123.120), and adopted regulations that have not yet been applied (Section 1123.130).

§ 1123.320. Administrative review of adjudicative proceeding

1123.320. If the agency action being challenged is a decision in an adjudicative proceeding, all administrative remedies available within an agency are deemed exhausted for the purpose of Section 1123.310 if no higher level of review is available within the agency, whether or not a rehearing or other lower level of review is available within the agency, unless a statute or regulation requires a petition for rehearing or other administrative review.

Comment. Section 1123.320 restates the existing California rule that a petition for a rehearing or other lower level administrative review is not a prerequisite to judicial review of a decision in an adjudicative proceeding. See former Gov't Code § 11523; Gov't Code § 19588 (State

Personnel Board). This overrules any contrary case law implication. *Cf.* *Alexander v. State Personnel Bd.*, 22 Cal. 2d 198, 137 P.2d 433 (1943).

Administrative remedies are deemed exhausted under this section only when no further higher level review is available within the agency issuing the decision. This does not excuse a requirement of further administrative review by another agency, such as an appeals board.

§ 1123.330. Judicial review of rulemaking

1123.330. (a) A person may obtain judicial review of rulemaking notwithstanding the person's failure to do either of the following:

(1) Participate in the rulemaking proceeding on which the rule is based.

(2) Petition the agency promulgating the rule for, or otherwise to seek, amendment, repeal, or reconsideration of the rule after it has become final.

(b) A person may obtain judicial review of an agency's failure to adopt a rule under Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, notwithstanding the person's failure to request or obtain a determination from the Office of Administrative Law under Section 11340.5 of the Government Code.

Comment. Subdivision (a)(2) of Section 1123.330 continues the former second sentence of subdivision (a) of Government Code Section 11350, and generalizes it to apply to local agencies as well as state agencies. See Sections 1120 (application of title), 1121.230 ("agency" defined), 1121.290 ("rule" defined). The petition to the agency referred to in subdivision (a) is authorized by Government Code Section 11340.6.

Subdivision (b) is new, and makes clear that exhaustion of remedies does not require filing a complaint with the Office of Administrative Law that an agency rule is an underground regulation. *Cf.* Gov't Code § 11340.5.

§ 1123.340. Exceptions to exhaustion of administrative remedies

1123.340. The requirement of exhaustion of administrative remedies is jurisdictional and the court may not relieve a

person of the requirement unless any of the following conditions is satisfied:

(a) The remedies would be inadequate.

(b) The requirement would be futile.

(c) The requirement would result in irreparable harm disproportionate to the public and private benefit derived from exhaustion.

(d) The person was entitled to notice of a proceeding in which relief could be provided but lacked timely notice of the proceeding. The court's authority under this subdivision is limited to remanding the case to the agency to conduct a supplemental proceeding in which the person has an opportunity to participate.

(e) The person seeks judicial review on the ground that the agency lacks subject matter jurisdiction in the proceeding.

(f) The person seeks judicial review on the ground that a statute, regulation, or procedure is facially unconstitutional.

Comment. Section 1123.340 authorizes the reviewing court to relieve the person seeking judicial review of the exhaustion requirement in limited circumstances. This enables the court to exercise some discretion. See generally Asimow, *Judicial Review: Standing and Timing*, 27 Cal. L. Revision Comm'n Reports 229, 260-71 (1997). This section may not be used as a means to avoid compliance with other requirements for judicial review, however, such as the exact issue rule. See Section 1123.350.

The exceptions to the exhaustion of remedies requirement consolidate and codify a number of existing case law exceptions, including:

Inadequate remedies. Under subdivision (a), administrative remedies need not be exhausted if the available administrative review procedure or the relief available through administrative review is insufficient. This codifies case law. See, e.g., *Common Cause v. Board of Supervisors*, 49 Cal. 3d 432, 443, 777 P.2d 610, 261 Cal. Rptr. 574 (1989); *Endler v. Schutzbank*, 68 Cal. 2d 162, 168, 436 P.2d 297, 65 Cal. Rptr. 297 (1968); *Rosenfield v. Malcolm*, 65 Cal. 2d 559, 421 P.2d 697, 55 Cal. Rptr. 505 (1967).

Futility. The exhaustion requirement is excused under subdivision (b) if it is certain, not merely probable, that the agency would deny the requested relief. See *Ogo Assocs. v. City of Torrance*, 37 Cal. App. 3d 830, 112 Cal. Rptr. 761 (1974).

Irreparable harm. Subdivision (c) codifies the existing narrow case law exception to the exhaustion of remedies requirement where exhaustion would result in irreparable harm disproportionate to the benefit derived from requiring exhaustion. The standard is drawn from 1981 Model State APA Section 5-107(3), but expands the factors to be considered to include private as well as public benefit.

Lack of notice. Lack of sufficient or timely notice of the agency proceeding is an excuse under subdivision (d). See *Environmental Law Fund v. Town of Corte Madera*, 49 Cal. App. 3d 105, 113-14, 122 Cal. Rptr. 282, 286 (1975).

Lack of subject matter jurisdiction. Subdivision (e) recognizes an exception to the exhaustion requirement where the challenge is to the agency's subject matter jurisdiction in the proceeding. See, e.g., *County of Contra Costa v. State of California*, 177 Cal. App. 3d 62, 73, 222 Cal. Rptr. 750, 758 (1986).

Constitutional issues. Under subdivision (f) administrative remedies need not be exhausted for a challenge to a statute, regulation, or procedure as unconstitutional on its face. See, e.g., *Horn v. County of Ventura*, 24 Cal. 3d 605, 611, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979); *Chevrolet Motor Div. v. New Motor Vehicle Bd.*, 146 Cal. App. 3d 533, 539, 194 Cal. Rptr. 270 (1983). There is no exception for a challenge to a provision as applied, even though phrased in constitutional terms.

§ 1123.350. Exact issue rule

1123.350. (a) Except as provided in subdivision (b), a person may not obtain judicial review of an issue that was not raised before the agency either by the person seeking judicial review or by another person.

(b) The court may permit judicial review of an issue that was not raised before the agency if any of the following conditions is satisfied:

(1) The agency did not have jurisdiction to grant an adequate remedy based on a determination of the issue.

(2) The person did not know and was under no duty to discover, or was under a duty to discover but could not reasonably have discovered, facts giving rise to the issue.

(3) The agency action subject to judicial review is a rule and the person has not been a party in an adjudicative proceeding that provided an adequate opportunity to raise the issue.

(4) The agency action subject to judicial review is a decision in an adjudicative proceeding and the person was not adequately notified of the adjudicative proceeding. If a statute or rule requires the person to maintain an address with the agency, adequate notice includes notice given to the person at the address maintained with the agency.

(5) The interests of justice would be served by judicial resolution of an issue arising from a change in controlling law occurring after the agency action or from agency action occurring after the person exhausted the last feasible opportunity to seek relief from the agency.

Comment. Subdivision (a) of Section 1123.350 codifies the case law exact issue rule. See, e.g., *Resource Defense Fund v. Local Agency Formation Comm'n*, 191 Cal. App. 3d 886, 894, 236 Cal. Rptr. 794, 798 (1987); *Coalition for Student Action v. City of Fullerton*, 153 Cal. App. 3d 1194, 200 Cal. Rptr. 855 (1984); see generally Asimow, *Judicial Review: Standing and Timing*, 27 Cal. L. Revision Comm'n Reports 229, 259-60 (1997). It limits the issues that may be raised and considered in the reviewing court to those that were raised before the agency. The exact issue rule is in a sense a variation of the exhaustion of remedies requirement — the agency must first have had an opportunity to determine the issue that is subject to judicial review.

Under subdivision (b) the court may relieve a person of the exact issue requirement in circumstances that are in effect an elaboration of the doctrine of exhaustion of administrative remedies. See also Section 1123.340 & Comment (exceptions to exhaustion of administrative remedies).

The intent of paragraph (1) of subdivision (b) is to permit the court to consider an issue that was not raised before the agency if the agency did not have jurisdiction to grant an adequate remedy based on a determination of the issue. Examples include: (A) an issue as to the facial constitutionality of the statute that enables the agency to function to the extent state law prohibits the agency from passing on the validity of the statute; (B) an issue as to the amount of compensation due as a result of an agency's breach of contract to the extent state law prohibits the agency from passing on this type of question.

Paragraph (2) permits a party to raise a new issue in the reviewing court if the issue arises from newly discovered facts that the party excusably did not know at the time of the agency proceedings.

Paragraph (3) permits a party to raise a new issue in the reviewing court if the challenged agency action is an agency rule and if the person seeking to raise the new issue in court was not a party in an adjudicative proceeding which provided an opportunity to raise the issue before the agency.

Paragraph (4) permits a new issue to be raised in the reviewing court by a person who was not properly notified of the adjudicative proceeding which produced the challenged decision. This does not give standing to a person not otherwise entitled to notice of the adjudicative proceeding.

Paragraph (5) permits a new issue to be raised in the reviewing court if the interests of justice would be served thereby, and the new issue arises from a change in controlling law or from agency action after the person exhausted the last opportunity for seeking relief from the agency. See *Lindeleaf v. Agricultural Labor Relations Bd.*, 41 Cal. 3d 861, 718 P.2d 106, 226 Cal. Rptr. 119 (1986).

Article 4. Standards of Review

§ 1123.410. Standards of review of agency action

1123.410. Except as otherwise provided by statute, agency action shall be judicially reviewed under the standards provided in this article.

Comment. Section 1123.410 is drawn from 1981 Model State APA Section 5-116(a)(2). The appropriate review standard of this article to be applied by the court depends on the issue being considered. For example, in exercising discretion, an agency may be called upon to interpret a statute, to determine basic facts, and to make the discretionary decision. In reviewing this action, the court would use the standard of Section 1123.420 (independent judgment with appropriate deference) in reviewing the statutory interpretation, the standard of Section 1123.430 (substantial evidence) or 1123.440 (substantial evidence or independent judgment) in reviewing the determination of facts, and the standard of Section 1123.450 (abuse of discretion) in reviewing the exercise of discretion.

The scope of judicial review provided in this article may be qualified by another statute that establishes review based on different standards than those in this article. See, e.g., Rev. & Tax. Code §§ 5170, 6931-6937.

§ 1123.420. Review of agency interpretation of law

1123.420. (a) The standard for judicial review of agency interpretation of law is the independent judgment of the court, giving deference to the determination of the agency appropriate to the circumstances of the agency action.

(b) This section does not apply to interpretation of law by the Public Employment Relations Board, Agricultural Labor Relations Board, or Workers' Compensation Appeals Board within the regulatory authority of those agencies.

Comment. Section 1123.420 clarifies and codifies existing case law on judicial review of agency interpretation of law.

Subdivision (a) applies the independent judgment test for judicial review of agency interpretation of law with appropriate deference to the agency's determination. Subdivision (a) codifies the case law rule that the final responsibility to decide legal questions belongs to the courts, not to administrative agencies. See, e.g., *Association of Psychology Providers v. Rank*, 51 Cal. 3d 1, 793 P.2d 2, 270 Cal. Rptr. 796 (1990). This rule is qualified by the requirement that the courts give deference to the agency's interpretation appropriate to the circumstances of the agency action. Factors in determining the deference appropriate include such matters as (1) whether the agency is interpreting a statute or its own regulation, (2) whether the agency's interpretation was contemporaneous with enactment of the law, (3) whether the agency has been consistent in its interpretation and the interpretation is long-standing, (4) whether there has been a reenactment with knowledge of the existing interpretation, (5) the degree to which the legal text is technical, obscure, or complex and the agency has interpretive qualifications superior to the court's, and (6) the degree to which the interpretation appears to have been carefully considered by responsible agency officials. See Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1195-98 (1995). See also *Jones v. Tracy School Dist.*, 27 Cal. 3d 99, 108, 611 P.2d 441, 165 Cal. Rptr. 100 (1980) (no deference for statutory interpretation in internal memo not subject to notice and hearing process for regulation and written after agency became amicus curiae in case at bench); *Hudgins v. Neiman Marcus Group, Inc.*, 34 Cal. App. 4th 1109, 41 Cal. Rptr. 2d 46 (1995) (deference to contemporaneous interpretation long acquiesced in by interested persons); *Grier v. Kizer*, 219 Cal. App. 3d 422, 434, 268 Cal. Rptr. 244 (1990) (deference to OAL interpretation of statute it enforces); *City of Los Angeles v. Los Olivos Mobile Home Park*, 213 Cal. App. 3d 1427, 262 Cal. Rptr. 446 (1989) (no deference for interpretation of city

ordinance in internal memo not adopted as regulation); *Johnston v. Department of Personnel Admin.*, 191 Cal. App. 3d 1218, 1226, 236 Cal. Rptr. 853 (1987) (no deference for interpretation in inter-departmental communication rather than in formal regulation); *California State Employees Ass'n v. State Personnel Bd.*, 178 Cal. App. 3d 372, 380, 223 Cal. Rptr. 826 (1986) (formal regulation entitled to deference, informal memo prepared for litigation not entitled to deference).

Under subdivision (a), the question of the appropriate degree of judicial deference to the agency interpretation of law is treated as “a continuum with nonreviewability at one end and independent judgment at the other.” See *Western States Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559, 575-76, 888 P.2d 1268, 38 Cal. Rptr. 2d 139, 147-48 (1995). Subdivision (a) is consistent with and continues the substance of cases saying courts must accept statutory interpretation by an agency within its expertise unless “clearly erroneous” as that standard was applied in *Nipper v. California Auto. Assigned Risk Plan*, 19 Cal. 3d 35, 45, 560 P.2d 743, 136 Cal. Rptr. 854 (1977) (courts respect “administrative interpretations of a law and, unless clearly erroneous, have deemed them significant factors in ascertaining statutory meaning and purpose”). The “clearly erroneous” standard was another way of requiring the courts in exercising independent judgment to give appropriate deference to the agency’s interpretation of law. See *Bodinson Mfg. Co. v. California Employment Comm’n*, 17 Cal. 2d 321, 325-26, 109 P.2d 935 (1941).

The deference due the agency’s determination does not override the ultimate authority of the court to substitute its own judgment for that of the agency under the standard of subdivision (a), especially when constitutional questions are involved. See *People v. Louis*, 42 Cal. 3d 969, 987, 728 P.2d 180, 232 Cal. Rptr. 110 (1986); Cal. Const. art. III, § 3.5.

Agency interpretation of law under subdivision (a) may include such questions as whether agency action, or the statute or regulation on which it is based, is unconstitutional, whether the agency acted beyond its jurisdiction, and whether the agency decided all issues requiring resolution.

Section 1123.420 does not deal with the question of agency application of law to fact. Thus this title does not affect existing law on this question. See, e.g., *S. G. Borello & Sons, Inc. v. Dept. of Indus. Relations*, 48 Cal. 3d 341, 349, 769 P.2d 399, 256 Cal. Rptr. 543 (1989); *Halaco Engineering Co. v. South Central Coast Regional Comm’n*, 42 Cal. 3d 52, 74-77, 720 P.2d 15, 227 Cal. Rptr. 667 (1986); Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1213-14 (1995).

Under subdivision (b), Section 1123.420 does not affect case law under which legal interpretations by the Public Employment Relations Board, Agricultural Labor Relations Board, or Workers' Compensation Appeals Board of statutes within their area of expertise have been given special deference. See, e.g., *Banning Teachers Ass'n v. Public Employment Relations Bd.*, 44 Cal. 3d 799, 804, 750 P.2d 313, 244 Cal. Rptr. 671 (1988); *Agricultural Labor Relations Bd. v. Superior Court*, 16 Cal. 3d 392, 400, 411, 546 P.2d 687, 128 Cal. Rptr. 183 (1976); *Judson Steel Corp. v. Workers' Compensation Appeals Bd.*, 22 Cal. 3d 658, 668, 586 P.2d 564, 150 Cal. Rptr. 250 (1978); *Agricultural Labor Relations Bd. v. Superior Court*, 48 Cal. App. 4th 1489, 56 Cal. Rptr. 2d 409 (1996); *United Farm Workers v. Agricultural Labor Relations Bd.*, 41 Cal. App. 4th 303, 48 Cal. Rptr. 2d 696, 703 (1995).

§ 1123.430. Review of agency factfinding

1123.430. (a) Except as provided in Section 1123.440, the standard for judicial review of whether agency action is based on an erroneous determination of fact made or implied by the agency is whether the agency's determination is supported by substantial evidence in the light of the whole record.

(b) If the factual basis for a decision in a state agency adjudication includes a determination of the presiding officer based substantially on the credibility of a witness, the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it.

(c) Notwithstanding any other provision of this section, the standard for judicial review of a determination of fact made by an administrative law judge employed by the Office of Administrative Hearings that is changed by the agency head is the independent judgment of the court whether the agency's determination of that fact is supported by the weight of the evidence.

Comment. Section 1123.430 supersedes former Section 1094.5(b)-(c) (abuse of discretion if decision not supported by findings or findings not supported by evidence).

Subdivision (a) eliminates for state agencies the rule of former Section 1094.5(c), providing for independent judgment review in cases where

“authorized by law.” The former standard was interpreted to provide for independent judgment review where a fundamental vested right is involved. *Bixby v. Pierno*, 4 Cal. 3d 130, 144, 481 P.2d 242, 93 Cal. Rptr. 234 (1971); see generally Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1161-76 (1995).

The substantial evidence test of subdivision (a) is not a toothless standard which calls for the court merely to rubber stamp an agency’s finding if there is any evidence to support it: The court must examine the evidence in the record both supporting and opposing the agency’s findings. *Bixby v. Pierno*, *supra*. If a reasonable person could have made the agency’s findings, the court must sustain them. But if the agency head comes to a different conclusion about credibility than the administrative law judge, the substantiality of the evidence supporting the agency’s decision is called into question.

Subdivision (b) continues the substance of language formerly found in Government Code Section 11425.50(b). The requirement that the presiding officer identify specific evidence of observed demeanor, manner, or attitude of the witness in credibility cases is in that section.

Under subdivision (c), independent judgment review of a changed determination of fact is limited to that fact. All other factual determinations are reviewed using the standard of subdivision (a) — substantial evidence in light of the whole record.

§ 1123.440. Review of factfinding in local agency adjudication

1123.440. The standard for judicial review of whether a decision of a local agency in an adjudicative proceeding is based on an erroneous determination of fact made or implied by the agency is:

(a) In cases in which the court is authorized by law to exercise its independent judgment on the evidence, the independent judgment of the court whether the determination is supported by the weight of the evidence.

(b) In all other cases, whether the determination is supported by substantial evidence in the light of the whole record.

Comment. Section 1123.440 continues former Section 1094.5(c) as it applied to factfinding in local agency adjudication. See *Strumsky v. San Diego County Employees Retirement Ass’n*, 11 Cal. 3d 28, 32, 520 P.2d 29, 112 Cal. Rptr. 805 (1974).

§ 1123.450. Review of agency exercise of discretion

1123.450. The standard for judicial review of whether agency action is a proper exercise of discretion, including an agency's determination under Section 11342.2 of the Government Code that a regulation is reasonably necessary to effectuate the purpose of the statute that authorizes the regulation, is abuse of discretion.

Comment. Section 1123.450 codifies the existing authority of the court to review agency action that constitutes an exercise of agency discretion. A court may decline to exercise review of discretionary action in circumstances where the Legislature so intended or where there are no standards by which a court can conduct review. *Cf.* 5 U.S.C. § 701(a)(2) (federal APA).

Section 1123.450 applies, for example, to a local agency land use decision as to whether a planned project is consistent with the agency's general plan. E.g., *Sequoyah Hills Homeowners Ass'n v. City of Oakland*, 23 Cal. App. 4th 704, 717-20, 29 Cal. Rptr. 2d 182, 189-91 (1993); *Dore v. County of Ventura*, 23 Cal. App. 4th 320, 328-29, 28 Cal. Rptr. 2d 299, 304 (1994). See also *Local & Regional Monitor v. City of Los Angeles*, 16 Cal. App. 4th 630, 648, 20 Cal. Rptr. 2d 228, 239 (1993); *No Oil, Inc. v. City of Los Angeles*, 196 Cal. App. 3d 223, 243, 242 Cal. Rptr. 37 (1987); *Greenebaum v. City of Los Angeles*, 153 Cal. App. 3d 391, 400-02, 200 Cal. Rptr. 237 (1984). Examples in the labor law field include *Independent Roofing Contractors v. Department of Indus. Relations*, 23 Cal. App. 4th 345, 28 Cal. Rptr. 2d 550 (1994), *Pipe Trades Dist. Council No. 51 v. Aubry*, 41 Cal. App. 4th 1457, 49 Cal. Rptr. 2d 208 (1996), and *International Bhd. of Elec. Workers, Local 11 v. Aubry*, 41 Cal. App. 4th 1632, 49 Cal. Rptr. 2d 759 (1996), all concerning agency discretion in making prevailing wage determinations, and *International Bhd. of Elec. Workers, Local 889 v. Department of Indus. Relations*, 42 Cal. App. 4th 861, 50 Cal. Rptr. 2d 1 (1996), concerning agency discretion in selecting an appropriate bargaining unit for transit district employees.

Section 1123.450 continues a portion of former Section 1094.5(b) (prejudicial abuse of discretion). It clarifies the standards for court determination of abuse of discretion but does not significantly change existing law. See former Code Civ. Proc. § 1094.5(c) (administrative mandamus); Gov't Code § 11350(b) (review of regulations). The reference to an agency determination under Government Code Section 11342.2 that a regulation is reasonably necessary continues existing law. See *Moore v. State Bd. of Accountancy*, 2 Cal. 4th 999, 1015, 831 P.2d

798, 9 Cal. Rptr. 2d 358, 367 (1992); California Ass'n of Psychology Providers v. Rank, 51 Cal. 3d 1, 11, 793 P.2d 2, 270 Cal. Rptr. 796 (1990).

The standard for reviewing agency discretionary action is whether there is abuse of discretion. The analysis consists of two elements. First, to the extent that the discretionary action is based on factual determinations, the standard of review of those factual determinations is provided in Section 1123.430 or, for local agency adjudication, in Section 1123.440. However, discretionary action such as agency rulemaking is frequently based on findings of legislative rather than adjudicative facts. Legislative facts are general in nature and are necessary for making law or policy (as opposed to adjudicative facts which are specific to the conduct of particular parties). Legislative facts are often scientific, technical, or economic in nature. Often, the determination of such facts requires specialized expertise and the factfindings involve guesswork or prophecy. A reviewing court must be appropriately deferential to agency findings of legislative fact and should not demand that such facts be proved with certainty. Nevertheless, a court can still legitimately review the rationality of legislative factfinding in light of the evidence in the whole record.

Second, discretionary action is based on a choice or judgment. A court reviews this choice by asking whether there is abuse of discretion in light of the record and the reasons stated by the agency. See Section 1123.820(d) (agency must supply reasons when necessary for proper judicial review). This standard is often encompassed by the terms "arbitrary" or "capricious." The court must not substitute its judgment for that of the agency, but the agency action must be rational. See Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1228-29 (1995). Abuse of discretion is established if it appears from the record viewed as a whole that the agency action is unreasonable, arbitrary, or capricious. Cf. ABA Section on Administrative Law, Restatement of Scope of Review Doctrine, 38 Admin. L. Rev. 235 (1986) (grounds for reversal include policy judgment so unacceptable or reasoning so illogical as to make agency action arbitrary, or agency's failure in other respects to use reasoned decisionmaking).

§ 1123.460. Review of agency procedure

1123.460. The standard for judicial review of the following issues is the independent judgment of the court, giving deference to the agency's determination of appropriate procedures:

(a) Whether the agency has engaged in an unlawful procedure or decisionmaking process, or has failed to follow prescribed procedure.

(b) Whether the persons taking the agency action were improperly constituted as a decisionmaking body or subject to disqualification.

Comment. Section 1123.460 codifies existing law concerning the independent judgment of the court and the deference due agency determination of procedures. *Cf.* 5 U.S.C. § 706(2)(D) (federal APA); *Mathews v. Eldridge*, 424 U.S. 319 (1976). Section 1123.460 is drawn from 1981 Model State APA Section 5-116(c)(5)-(6). It continues a portion of former Section 1094.5(b) (inquiry of the court extends to questions whether there has been a fair trial or the agency has not proceeded in the manner required by law). One example of an agency's failure to follow prescribed procedure is the agency's failure to act within the prescribed time upon a matter submitted to the agency.

The degree of deference to be given to the agency's determination under Section 1123.460 is for the court to determine. The deference is not absolute. Ultimately, the court must still use its judgment on the issue.

Section 1123.460 does not apply to state agency rulemaking. Gov't Code § 11350.

§ 1123.470. Burden of persuasion

1123.470. Except as otherwise provided by statute, the burden of demonstrating the invalidity of agency action or entitlement to relief is on the party asserting the invalidity or entitlement to relief.

Comment. Section 1123.470 codifies existing law. See California Administrative Mandamus §§ 4.157, 12.7 (Cal. Cont. Ed. Bar, 2d ed. 1989). It is drawn from 1981 Model State APA Section 5-116(a)(1).

Article 5. Superior Court Jurisdiction and Venue

§ 1123.510. Superior court jurisdiction

1123.510. (a) Except as otherwise provided by statute, jurisdiction for judicial review under this chapter is in the superior court.

(b) Nothing in this section prevents the Supreme Court or courts of appeal from exercising original jurisdiction under Section 10 of Article VI of the California Constitution.

Comment. Section 1123.510 is drawn from 1981 Model State APA Section 5-104, alternative A. Under prior law, except where the issues were of great public importance and had to be resolved promptly or where otherwise provided by statute, the superior court was the proper court for administrative mandamus proceedings. See *Mooney v. Pickett*, 4 Cal. 3d 669, 674-75, 483 P.2d 1231, 94 Cal. Rptr. 279 (1971). Although the Supreme Court and courts of appeal may exercise original mandamus jurisdiction in exceptional circumstances, the superior court is in a better position to determine questions of fact than is an appellate tribunal and is therefore the preferred court. *Roma Macaroni Factory v. Giambastiani*, 219 Cal. 435, 437, 27 P.2d 371 (1933).

The introductory clause of Section 1123.510(a) recognizes that statutes applicable to some proceedings provide that judicial review is in the court of appeal or Supreme Court. See Bus. & Prof. Code § 23090 (Alcoholic Beverage Control Appeals Board and Department of Alcoholic Beverage Control); Gov't Code §§ 3520(c), 3542(c), 3564(c) (Public Employment Relations Board); Lab. Code §§ 1160.8 (Agricultural Labor Relations Board), 5950 (Workers' Compensation Appeals Board).

§ 1123.520. Superior court venue

1123.520. (a) Except as otherwise provided by statute, the proper county for judicial review under this chapter is:

(1) In the case of state agency action, the county where the cause of action, or some part thereof, arose, or Sacramento County.

(2) In the case of action of a nongovernmental entity, the county where the entity is located.

(3) In cases not governed by paragraph (1) or (2), including local agency action, the county or counties of jurisdiction of the agency.

(b) A proceeding under this chapter may be transferred on the grounds and in the manner provided for transfer of a civil action under Title 4 (commencing with Section 392) of Part 2.

Comment. Subdivision (a)(1) of Section 1123.520 continues prior law for judicial review of state agency action, with the addition of Sacramento County. See Code Civ. Proc. § 393(1)(b); California Administrative Mandamus § 8.16, at 269 (Cal. Cont. Ed. Bar, 2d ed. 1989); *Duval v. Contractors State License Bd.*, 125 Cal. App. 2d 532, 271 P.2d 194 (1954). Subdivision (a)(2) continues what appears to have been existing law for judicial review of action of a nongovernmental entity. See California Administrative Mandamus, *supra*, § 8.16, at 270.

Subdivision (a)(3) is new, but is probably not a substantive change, since the cause of action is likely to arise in the county of the local agency's jurisdiction. In addition to applying to local agencies (defined in Section 1121.260), subdivision (a)(3) applies to agencies that are neither state nor local. See, e.g., Gov't Code § 66801 (Tahoe Regional Planning Agency).

Under subdivision (b), a case filed in the wrong county should not be dismissed, but should be transferred to the proper county. See Sections 1123.710(a) (applicability of rules of practice for civil actions), 396b. *Cf. Padilla v. Department of Alcoholic Beverage Control*, 43 Cal. App. 4th 1151, 51 Cal. Rptr. 2d 133 (1996) (transfer from court lacking jurisdiction).

The venue rules of Section 1123.520 are subject to a conflicting or inconsistent statute applicable to a particular entity (Section 1121.110), such as Business and Professions Code Section 2019 (venue for proceedings against the Medical Board of California). For venue of judicial review of a decision of a private hospital board, see Health & Safety Code § 1339.63(b).

Article 6. Petition for Review; Time Limits

§ 1123.610. Petition for review

1123.610. (a) A person seeking judicial review of agency action may initiate judicial review by filing a petition for review with the court.

(b) The petition shall name as respondent the agency whose action is at issue or the agency head by title, and not individual employees of the agency.

(c) The petitioner shall cause a copy of the petition for review to be served on the parties in the same manner as service of a summons in a civil action.

Comment. Subdivision (a) of Section 1123.610 supersedes the first sentence of former Government Code Section 11523.

Subdivision (b) codifies existing practice. See California Administrative Mandamus §§ 6.1-6.3, at 225-27 (Cal. Cont. Ed. Bar, 2d ed. 1989). Although the petition may name the agency head as a respondent by title, subdivision (b) makes clear “agency” does not include individual employees of the agency. See Sections 1121.230 (“agency” defined), 1121.210 (definitions vary as required by the provision).

Subdivision (c) continues existing practice. See California Administrative Mandamus, *supra*, §§ 8.48, 9.17, 9.23, at 298-99, 320, 326. Since the petition for review serves the purpose of the alternative writ of mandamus or notice of motion under prior law, a summons is not required. See California Administrative Mandamus, *supra*, §§ 9.8, 9.21, at 315, 324.

§ 1123.620. Contents of petition for review

1123.620. The petition for review shall state all of the following:

(a) The name of the petitioner.

(b) The address and telephone number of the petitioner or, if the petitioner is represented by an attorney, of the petitioner’s attorney.

(c) The name and mailing address of the agency whose action is at issue.

(d) Identification of the agency action at issue, together with a duplicate copy, summary, or brief description of the agency action.

(e) Identification of persons who were parties in any adjudicative proceedings that led to the agency action.

(f) Facts to demonstrate that the petitioner is entitled to judicial review.

(g) The reasons why relief should be granted.

(h) A request for relief, specifying the type and extent of relief requested.

Comment. Section 1123.620 is drawn from 1981 Model State APA Section 5-109.

§ 1123.630. Time for filing petition for review in adjudication of agency other than local agency and formal adjudication of local agency

1123.630. (a) The petition for review of a decision of an agency, other than a local agency, in an adjudicative proceeding, and of a decision of a local agency in a proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, shall be filed not later than 30 days after the decision is effective or after the notice required by subdivision (e) is delivered, served, or mailed, whichever is later.

(b) For the purpose of this section:

(1) A decision in a proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code is effective at the time provided in Section 11519 of the Government Code.

(2) In an adjudicative proceeding other than under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, a decision of an agency other than a local agency is effective 30 days after it is delivered or mailed to the person to which the decision is directed, unless any of the following conditions is satisfied:

(A) Reconsideration is ordered within that time pursuant to express statute or rule.

(B) The agency orders that the decision is effective sooner.

(C) A different effective date is provided by statute or regulation.

(c) Subject to subdivision (d), the time for filing the petition for review is extended for a party:

(1) During any period when the party is seeking reconsideration of the decision pursuant to express statute or rule.

(2) Until 30 days after the record is delivered to the party if, within 15 days after the decision is effective, the party makes a written request to the agency to prepare all or any part of the

record, and, within 15 days after being notified of the estimated fee and cost, pays the fee and cost provided in Section 1123.910.

(d) In no case shall a petition for review of a decision described in subdivision (a) be filed later than one hundred eighty days after the decision is effective.

(e) In addition to any notice of agency action required by statute, in an adjudicative proceeding described in subdivision (a), the agency shall in the decision or otherwise give notice to the parties in substantially the following form: “The last day to file a petition with a court for review of the decision is [date] unless another statute provides a longer period or the time is extended as provided by law.”

Comment. Section 1123.630 provides a limitation period for initiating judicial review of specified agency adjudicative decisions. See Section 1121.250 (“decision” defined). See also Section 1123.640 (time for filing petition in other adjudicative proceedings). This preserves the distinction in existing law between limitation of judicial review of quasi-legislative and quasi-judicial agency actions. Other types of agency action may be subject to other limitation periods, or to equitable doctrines such as laches. The provision in subdivision (c)(2) making the extension of time during preparation of the record contingent on payment of the fee is drawn from former Government Code Section 11523. See also Sections 12-12b (computation of time).

Subdivision (a) supersedes the second sentence of former Government Code Section 11523 (30 days). It also unifies review periods formerly found in various special statutes. See, e.g., Gov’t Code § 3542 (Public Employment Relations Board); Lab. Code §§ 1160.8 (Agricultural Labor Relations Board), 5950 (Workers’ Compensation Appeals Board); Veh. Code § 13559 (Department of Motor Vehicles).

Section 1123.630 does not override special limitations periods statutorily preserved for policy reasons, such as for judicial review of an administratively-issued withholding order for taxes (Code Civ. Proc. § 706.075), notice of deficiency of an assessment due from a producer under a commodity marketing program (Food & Agric. Code §§ 59234.5, 60016), State Personnel Board (Gov’t Code § 19630), Department of Personnel Administration (Gov’t Code § 19815.8), Unemployment Insurance Appeals Board (Unemp. Ins. Code §§ 410, 1243), certain driver’s license orders (Veh. Code § 14401(a)), or welfare decisions of the Department of Social Services (Welf. & Inst. Code §

10962). See Section 1121.110 (conflicting or inconsistent statute controls). Section 1123.630 does not apply to proceedings under the California Environmental Quality Act. Pub. Res. Code § 21168(b).

The time within which judicial review must be initiated under subdivision (a) begins to run on the date the decision is effective. A decision under the formal hearing procedure of the Administrative Procedure Act generally is effective 30 days after it becomes final, unless the agency head makes it effective sooner or stays its effective date. See Gov't Code § 11519. For special statutes on the effective date of a decision, see Educ. Code §§ 94323, 94933; Gov't Code § 8670.68; Health & Safety Code §§ 443.37, 25187, 25514.6, 108900, 111855, 111940, 128775; Ins. Code §§ 728, 1858.6, 12414.19; Pub. Res. Code § 2774.2; Veh. Code § 13953. Judicial review may only be had of a final decision. Section 1123.120.

Nothing in this section overrides standard restrictions on application of statutes of limitations, such as estoppel to plead the statute (see, e.g., *Ginns v. Savage*, 61 Cal. 2d 520, 393 P.2d 689, 39 Cal. Rptr. 377 (1964)), correction of technical defects (see, e.g., *United Farm Workers of America v. ALRB*, 37 Cal. 3d 912, 694 P.2d 138, 210 Cal. Rptr. 453 (1985)), computation of time (see Gov't Code §§ 6800-6807), and application of due process principles to a notice of decision (see, e.g., *State Farm Fire & Casualty v. Workers' Compensation Appeals Bd.*, 119 Cal. App. 3d 193, 173 Cal. Rptr. 778 (1981)).

Subdivision (e) is drawn from former Code of Civil Procedure Section 1094.6(f). See also Unemp. Ins. Code § 410; Veh. Code § 14401(b). An agency notice that erroneously shows a date that is too soon does not shorten the period for review, since the substantive rules in Section 1123.630 govern. If the notice erroneously shows a date that is later than the last day to petition for review and the petition is filed before that later date, the agency may be estopped to assert that the time has expired. See *Ginns v. Savage*, 61 Cal. 2d 520, 523-25, 393 P.2d 689, 39 Cal. Rptr. 377 (1964).

The introductory clause of subdivision (e) makes clear that notice of agency action required by other special provisions do not override this section. Special provisions include those for judicial review of an administratively-issued withholding order for taxes (Code Civ. Proc. § 706.075), for an assessment due from a producer under a commodity marketing program (Food & Agric. Code §§ 59234.5, 60016), for denial by a county of disability retirement (Gov't Code § 31725), and under the California Environmental Quality Act (Pub. Res. Code §§ 21108 (state agency), 21152 (local agency)). See Section 1121.110 (conflicting or inconsistent statute controls).

§ 1123.640. Time for filing petition for review in other adjudicative proceedings

1123.640. (a) The petition for review of a decision in an adjudicative proceeding, other than a petition governed by Section 1123.630, shall be filed not later than 90 days after the decision is announced or after the notice required by subdivision (d) is delivered, served, or mailed, whichever is later.

(b) Subject to subdivision (c), the time for filing the petition for review is extended as to a party:

(1) During any period when the party is seeking reconsideration of the decision pursuant to express statute, rule, charter, or ordinance.

(2) Until 30 days after the record is delivered to the party if, within 15 days after the decision is effective, the party makes a written request to the agency to prepare all or any part of the record, and, within 15 days after being notified of the estimated fee and cost, pays the fee and cost provided in Section 1123.910.

(c) In no case shall a petition for review of a decision described in subdivision (a) be filed later than one hundred eighty days after the decision is announced or reconsideration is rejected, whichever is later.

(d) In addition to any notice of agency action required by statute, in an adjudicative proceeding described in subdivision (a), the agency shall in the decision or otherwise give notice to the parties in substantially the following form: “The last day to file a petition with a court for review of the decision may be as early as 90 days after the decision is announced, or in the case of a decision pursuant to environmental laws, as early as 30 days after the time begins to run.”

Comment. Section 1123.640 continues the 90-day limitations period for local agency adjudication in former Section 1094.6(b). The provision in subdivision (b)(2) making the extension of time during preparation of the record contingent on payment of the fee and cost is drawn from

former Government Code Section 11523. See also Sections 12-12b (computation of time).

Section 1123.640 does not override special limitations periods applicable to particular proceedings, such as for cancellation by a city or county of a contract limiting use of agricultural land under the Williamson Act (Gov't Code § 51286), decision of a local legislative body adopting or amending a general or specific plan, zoning ordinance, regulation attached to a specific plan, or development agreement (Gov't Code § 65009), or a cease and desist order of the San Francisco Bay Conservation and Development Commission and complaint by BCDC for administrative civil liability (Gov't Code §§ 66639, 66641.7). See Section 1121.110 (conflicting or inconsistent statute controls). Section 1123.640 does not apply to proceedings under the California Environmental Quality Act. Pub. Res. Code § 21168(b).

Subdivision (d) is drawn from former Code of Civil Procedure Section 1094.6(f). For an example of a 30-day period under environmental laws, see Gov't Code §§ 66639, 66641.7. See also the Comment to the parallel provision in Section 1123.630.

Article 7. Review Procedure

§ 1123.710. Applicability of rules of practice for civil actions

1123.710. (a) Except as otherwise provided in this title or by rules of court adopted by the Judicial Council not inconsistent with this title, Part 2 (commencing with Section 307) applies to proceedings under this title.

(b) The following provisions of Part 2 (commencing with Section 307) do not apply to a proceeding under this title:

(1) Section 426.30.

(2) Subdivision (a) of Section 1013.

(c) A party may obtain discovery in a proceeding under this title only of the following:

(1) Matters reasonably calculated to lead to the discovery of evidence admissible under Section 1123.850.

(2) Matters in possession of the agency for the purpose of determining the accuracy of the affidavit of the agency official who compiled the administrative record for judicial review.

Comment. Subdivision (a) of Section 1123.710 continues the effect of Section 1109 in proceedings under this title. For example, under Section 632, upon the request of any party appearing at the trial, the court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial. See *Delany v. Toomey*, 111 Cal. App. 2d 570, 571-72, 245 P.2d 26 (1952).

Under subdivision (b)(1), the compulsory cross-complaint provisions of Section 426.30 do not apply to judicial review under this title.

Subdivision (b)(2) provides that the provisions of Section 1013(a) for extension of time when notice is mailed do not apply to judicial review under this title. This continues prior law for judicial review of local agency action under former Section 1094.6. *Tielsch v. City of Anaheim*, 160 Cal. App. 3d 576, 206 Cal. Rptr. 740 (1984). Prior law was unclear whether Section 1013(a) applied to judicial review of state agency proceedings under former Section 1094.5. See California Administrative Mandamus § 7.4, at 242 (Cal. Cont. Ed. Bar, 2d ed. 1989). For statutes providing that Section 1013 does apply, see Lab. Code § 98.2; Veh. Code § 40230. These statutes prevail over Section 1123.710(b)(2). See Section 1121.110 (conflicting or inconsistent statute controls).

Subdivision (c)(1) codifies *City of Fairfield v. Superior Court*, 14 Cal. 3d 768, 774-75, 537 P.2d 375, 122 Cal. Rptr. 543 (1975). The affidavit referred to in subdivision (c)(2) is provided for in Section 1123.820.

§ 1123.720. Stay of agency action

1123.720. (a) The filing of a petition for review under this title does not of itself stay or suspend the operation of any agency action.

(b) Subject to subdivision (g), on application of the petitioner, the reviewing court may grant a stay of the agency action pending the judgment of the court if it finds that all of the following conditions are satisfied:

(1) The petitioner is likely to prevail ultimately on the merits.

(2) Without a stay the petitioner will suffer irreparable injury.

(3) The grant of a stay to the petitioner will not cause substantial harm to others.

(4) The grant of a stay to the petitioner will not substantially threaten the public health, safety, or welfare.

(c) The application for a stay shall be accompanied by proof of service of a copy of the application on the agency. Service shall be made in the same manner as service of a summons in a civil action.

(d) The court may condition a stay on appropriate terms, including the giving of security for the protection of parties or others.

(e) If an appeal is taken from a denial of relief by the superior court, the agency action shall not be further stayed except on order of the court to which the appeal is taken. However, in cases where a stay is in effect at the time of filing the notice of appeal, the stay is continued by operation of law for a period of 20 days after the filing of the notice.

(f) Except as provided by statute, if an appeal is taken from a granting of relief by the superior court, the agency action is stayed pending the determination of the appeal unless the court to which the appeal is taken orders otherwise. Notwithstanding Section 916, the court to which the appeal is taken may direct that the appeal shall not stay the granting of relief by the superior court.

(g) No stay may be granted to prevent or enjoin the state or an officer of the state from collecting a tax.

Comment. Section 1123.720 is drawn from 1981 Model State APA Section 5-111, and supersedes former Section 1094.5(g)-(h).

Subdivision (b)(1) generalizes the requirement of former Section 1094.5(h)(1) that a stay may not be granted unless the petitioner is likely to prevail on the merits. The former provision applied only to a decision of a licensed hospital or state agency made after a hearing under the formal hearing provisions of the Administrative Procedure Act.

Subdivision (b)(1) requires more than a conclusion that a possible viable defense exists. The court must make a preliminary assessment of the merits of the judicial review proceeding and conclude that the petitioner is likely to obtain relief in that proceeding. *Medical Bd. of California v. Superior Court*, 227 Cal. App. 3d 1458, 1461, 278 Cal. Rptr. 247 (1991); *Board of Medical Quality Assurance v. Superior Court*, 114 Cal. App. 3d 272, 276, 170 Cal. Rptr. 468 (1980).

Subdivision (c) continues a portion of the second sentence and all of the third sentence of former Section 1094.5(g), and a portion of the second sentence and all of the third sentence of former Section 1094.5(h)(1).

Subdivision (d) codifies case law. See *Venice Canals Resident Home Owners Ass'n v. Superior Court*, 72 Cal. App. 3d 675, 140 Cal. Rptr. 361 (1977) (stay conditioned on posting bond).

Subdivision (e) continues the fourth and fifth sentences of former Section 1094.5(g) and the first and second sentences of former Section 1094.5(h)(3).

The first sentence of subdivision (f) continues the sixth sentence of former Section 1094.5(g) and the third sentence of former Section 1094.5(h)(3). The introductory clause of the first sentence recognizes that statutes may provide special stay rules for particular proceedings. See, e.g., Section 1110a (proceedings concerning irrigation water). The second sentence of subdivision (f) is drawn from Section 1110b, and replaces Section 1110b for judicial review proceedings under this title.

Subdivision (g) recognizes that the California Constitution provides that no legal or equitable process shall issue against the state or any officer of the state to prevent or enjoin the collection of any tax. Cal. Const. art. XIII, § 32.

A decision in a formal adjudicative proceeding under the Administrative Procedure Act may also be stayed by the agency. Gov't Code § 11519(b).

§ 1123.730. Type of relief

1123.730. (a) Subject to subdivision (c), the court may grant appropriate relief justified by the general set of facts alleged in the petition for review, whether mandatory, injunctive, or declaratory, preliminary or final, temporary or permanent, equitable or legal. In granting relief, the court may order agency action required by law, order agency exercise of discretion required by law, set aside or modify agency action, enjoin or stay the effectiveness of agency action, remand the matter for further proceedings, render a declaratory judgment, or take any other action that is authorized and appropriate. The court may grant necessary ancillary relief to redress the effects of official action wrongfully taken or withheld.

(b) The court may award damages or compensation, subject to any of the following that are applicable:

(1) Division 3.6 (commencing with Section 810) of the Government Code.

(2) The procedure for a claim against a local agency prescribed in a charter, ordinance, or regulation adopted pursuant to Section 935 of the Government Code.

(3) Other express statute.

(c) In reviewing a decision in a proceeding in a state agency adjudication subject to Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code, the court shall enter judgment either commanding the agency to set aside the decision or denying relief. If the judgment commands that the decision be set aside, the court may order reconsideration of the case in light of the court's opinion and judgment and may order the agency to take further action that is specially enjoined upon it by law.

(d) The court may award attorney's fees or witness fees only to the extent expressly authorized by statute.

(e) If the court sets aside or modifies agency action or remands the matter for further proceedings, the court may make any interlocutory order necessary to preserve the interests of the parties and the public pending further proceedings or agency action.

Comment. Section 1123.730 is drawn from 1981 Model State APA Section 5-117, and supersedes former Section 1094.5(f). Section 1123.730 makes clear that the single form of action established by Sections 1121.120 and 1123.610 encompasses any appropriate type of relief, with the exceptions indicated.

Subdivision (b) continues the effect of Code of Civil Procedure Section 1095 permitting the court to award damages in an appropriate case. Under subdivision (b), the court may award damages or compensation subject to the Tort Claims Act, if applicable. The claim presentation requirements of the Tort Claims Act do not apply, for example, to a claim against a local public entity for earned salary or wages. Gov't Code § 905(c). See also *Snipes v. City of Bakersfield*, 145 Cal. App. 3d 861, 193 Cal. Rptr. 760 (1983) (claims requirements of Tort

Claims Act do not apply to actions under Fair Employment and Housing Act); *O'Hagan v. Board of Zoning Adjustment*, 38 Cal. App. 3d 722, 729, 113 Cal. Rptr. 501, 506 (1974) (claim for damages for revocation of use permit subject to Tort Claims Act); *Eureka Teacher's Ass'n v. Board of Educ.*, 202 Cal. App. 3d 469, 475-76, 247 Cal. Rptr. 790 (1988) (action seeking damages incidental to extraordinary relief not subject to claims requirements of Tort Claims Act); *Loehr v. Ventura County Community College Dist.*, 147 Cal. App. 3d 1071, 1081, 195 Cal. Rptr. 576 (1983) (action primarily for money damages seeking extraordinary relief incidental to damages is subject to claims requirements of Tort Claims Act). Nothing in Section 1123.730 authorizes the court to interfere with a valid exercise of agency discretion or to direct an agency how to exercise its discretion. Section 1121.140.

Subdivision (c) continues the first sentence and first portion of the second sentence of former Section 1094.5(f). Subdivision (c) applies to state agency adjudications subject to Government Code Sections 11400-11470.50. These provisions apply to all state agency adjudications unless specifically excepted. Gov't Code § 11410.20 (operative July 1, 1997) and Comment.

For statutes authorizing an award of attorney's fees, see Sections 1028.5, 1123.950. See also Gov't Code §§ 68092.5 (expert witness fees), 68093 (mileage and fees in civil cases in superior court), 68096.1-68097.10 (witness fees of public officers and employees). *Cf.* Gov't Code § 11450.40 (fees for witness appearing in APA proceeding pursuant to subpoena) (operative July 1, 1997).

§ 1123.740. Jury trial

1123.740. All proceedings shall be heard by the court sitting without a jury.

Comment. Section 1123.740 continues a portion of the first sentence of former Section 1094.5(a) and generalizes it to apply to all proceedings under this title.

Article 8. Record for Judicial Review

§ 1123.810. Administrative record exclusive basis for judicial review

1123.810. (a) Except as provided in Section 1123.850 or as otherwise provided by statute, the administrative record is the exclusive basis for judicial review of agency action if both of the following requirements are satisfied:

(1) The agency gave interested persons notice and an opportunity to submit oral or written comment.

(2) The agency maintained a record or file of its proceedings.

(b) If the requirements of subdivision (a) are not satisfied, the court may either receive evidence itself or remand to the agency to do so.

Comment. Section 1123.810 codifies existing practice. See, e.g., *Beverly Hills Fed. Sav. & Loan Ass'n v. Superior Court*, 259 Cal. App. 2d 306, 324, 66 Cal. Rptr. 183, 192 (1968). For authority to augment the administrative record for judicial review, see Section 1123.850 (new evidence on judicial review).

The closed record rule of subdivision (a) is limited to cases where the agency gave notice and an opportunity to submit oral or written comment, and maintained a record or file of its proceedings. These requirements will generally be satisfied in most administrative adjudication and quasi-legislative action. In other cases, subdivision (b) makes clear the court may either receive evidence itself or may remand to the agency to receive the evidence. This will apply to most ministerial and informal action. These rules are generally consistent with *Western States Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559, 888 P.2d 1268, 38 Cal. Rptr. 2d 139 (1995).

If the closed record requirement of Section 1123.810(a) applies, the court still has some discretion to remand to the agency. See Section 1123.850(c).

§ 1123.820. Contents of administrative record

1123.820. (a) Except as provided in subdivision (b), the administrative record for judicial review of agency action consists of all of the following:

(1) Any agency documents expressing the agency action.

(2) Other documents identified by the agency as having been considered by it before its action and used as a basis for its action.

(3) All material submitted to the agency in connection with the agency action.

(4) A transcript of any hearing, if one was maintained, or minutes of the proceeding. In case of electronic reporting of

proceedings, the transcript or a copy of the electronic reporting shall be part of the administrative record in accordance with the rules applicable to the record on appeal in judicial proceedings.

(5) Any other material described by statute as the administrative record for the type of agency action at issue.

(6) An affidavit of the agency official who has compiled the administrative record for judicial review specifying the date on which the record was closed and that the record is complete.

(7) Any other matter expressly prescribed for inclusion in the administrative record by rules of court adopted by the Judicial Council.

(b) The administrative record for judicial review of rulemaking under Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code is the file of the rulemaking proceeding prescribed by Section 11347.3 of the Government Code.

(c) By stipulation of all parties to judicial review proceedings, the administrative record for judicial review may be shortened, summarized, or organized, or may be an agreed or settled statement of the parties, in accordance with the rules applicable to the record on appeal in judicial proceedings.

(d) If an explanation of reasons for the agency action is not otherwise included in the administrative record, the court may require the agency to add to the administrative record for judicial review a brief explanation of the reasons for the agency action to the extent necessary for proper judicial review.

Comment. Section 1123.820 is drawn from 1981 Model State APA Section 5-115(a), (d), (f)-(g). For authority to augment the administrative record for judicial review, see Section 1123.850 (new evidence on judicial review). The administrative record for judicial review is related but not necessarily identical to the record of agency proceedings that is

prepared and maintained by the agency. The administrative record for judicial review specified in this section is subject to the provisions of this section on shortening, summarizing, or organizing the record, or stipulation to an agreed or settled statement of the parties. Subdivision (c).

Subdivision (a) supersedes the seventh sentence of former Government Code Section 11523 (judicial review of formal adjudicative proceedings under Administrative Procedure Act). In the case of an adjudicative proceeding, the record will include the final decision and all notices and orders issued by the agency (subdivision (a)(1)), any proposed decision by an administrative law judge (subdivision (a)(2)), the pleadings, the exhibits admitted or rejected, and the written evidence and any other papers in the case (subdivision (a)(3)), and a transcript of all proceedings (subdivision (a)(4)).

Treatment of the record in the case of electronic reporting of proceedings in subdivision (a)(4) is derived from Rule 980.5 of the California Rules of Court (electronic recording as official record of proceedings).

The affidavit requirement in subdivision (a)(6) may be satisfied by a declaration under penalty of perjury. Section 2015.5.

Subdivision (d) supersedes the case law requirement of *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974), that adjudicative decisions reviewed under former Section 1094.5 be explained, and extends it to other agency action such as rulemaking and discretionary action. The court should not require an explanation of the agency action if it is not necessary for proper judicial review, for example if the explanation is obvious. A decision in an adjudicative proceeding under the Administrative Procedure Act must include a statement of the factual and legal basis for the decision. Gov't Code § 11425.50 (operative July 1, 1997).

If there is an issue of completeness of the administrative record, the court may permit limited discovery of the agency file for the purpose of determining the accuracy of the affidavit of completeness. See Section 1123.710(c) (discovery in judicial review proceeding). A party is not entitled to discovery of material in the agency file that is privileged. See, e.g., Gov't Code § 6254 (exemptions from California Public Records Act). Moreover, the administrative record reflects the actual documents that are the basis of the agency action. Except as provided in subdivision (d), the agency cannot be ordered to prepare a document that does not exist, such as a summary of an oral ex parte contact in a case where the contact is permissible and no other documentation requirement exists. If judicial review reveals that the agency action is not supported by the record, the court may grant appropriate relief, including setting aside,

modifying, enjoining, or staying the agency action, or remanding for further proceedings. Section 1123.730.

§ 1123.830. Preparation of record

1123.830. (a) On request of the petitioner for the administrative record for judicial review of agency action:

(1) If the agency action is a decision in an adjudicative proceeding required to be conducted by an administrative law judge employed by the Office of Administrative Hearings, the administrative record shall be prepared by the Office of Administrative Hearings.

(2) If the agency action is other than that described in paragraph (1), the administrative record shall be prepared by the agency.

(b) Except as otherwise provided by statute, the administrative record shall be delivered to the petitioner as follows:

(1) Within 30 days after the request and payment of the fee provided in Section 1123.910 in an adjudicative proceeding involving an evidentiary hearing of 10 days or less.

(2) Within 60 days after the request and payment of the fee provided in Section 1123.910 in a nonadjudicative proceeding, or in an adjudicative proceeding involving an evidentiary hearing of more than 10 days.

(c) For good cause shown, the time limits provided in subdivision (b) may be extended by either or both of the following:

(1) By the court for a reasonable period.

(2) By the agency for a period not exceeding 190 days after the request and payment of the fee and cost provided in Section 1123.910. This paragraph does not apply to review of an adjudicative proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

(d) If the agency fails timely to deliver the record, the court may order the agency to deliver the record, and may impose sanctions and grant other appropriate relief for failure to comply with any such order.

Comment. Section 1123.830 supersedes the fourth sentence of former Government Code Section 11523 and the first sentence of subdivision (c) of former Code of Civil Procedure Section 1094.6. Under former Section 11523, in judicial review of proceedings under the Administrative Procedure Act, the record was to be prepared either by the Office of Administrative Hearings or by the agency. However, in practice the record was prepared by the Office of Administrative Hearings, consistent with subdivision (a)(1). The provision in subdivision (b) making the agency's duty to prepare and deliver the record contingent on payment of the fee is drawn from former Government Code Section 11523.

Although Section 1123.830 requires the Office of Administrative Hearings or the agency to prepare the record, the burden is on the petitioner attacking the administrative decision to show entitlement to judicial relief, so it is petitioner's responsibility to make the administrative record available to the court. *Foster v. Civil Serv. Comm'n*, 142 Cal. App. 3d 444, 453, 190 Cal. Rptr. 893, 899 (1983). However, this does not authorize use of an unofficial record for judicial review.

Although subdivision (a) requires the agency to prepare the record on request of the petitioner for review, in state agency rulemaking under the Administrative Procedure Act, the file is already complete at the time of review. See Gov't Code § 11347.3.

The introductory clause of subdivision (b) recognizes that some statutes prescribe the time to prepare the record in particular proceedings. See, e.g., Gov't Code § 3564 (10-day limit for Public Employment Relations Board).

§ 1123.840. Disposal of administrative record

1123.840. Any administrative record received for filing by the clerk of the court may be disposed of as provided in Sections 1952, 1952.2, and 1952.3.

Comment. Section 1123.840 continues former Section 1094.5(i) without change. Rulemaking records should be carefully safeguarded by the agency. Concerning retention of rulemaking records by the Secretary of State, see Gov't Code §§ 11347.3, 12223.5, 14755.

§ 1123.850. New evidence on judicial review

1123.850. (a) If the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded in the agency proceedings, it may enter judgment remanding the case for reconsideration in the light of that evidence. Except as provided in this section, the court shall not admit the evidence on judicial review without remanding the case.

(b) The court may receive evidence described in subdivision (a) without remanding the case in any of the following circumstances:

(1) The evidence relates to the validity of the agency action and is needed to decide (i) improper constitution as a decisionmaking body, or grounds for disqualification, of those taking the agency action, or (ii) unlawfulness of procedure or of decisionmaking process.

(2) The agency action is a decision in an adjudicative proceeding and the evidence relates to an issue for which the standard of review is the independent judgment of the court.

(c) Whether or not the evidence is described in subdivision (a), the court may receive evidence in addition to that contained in the administrative record for judicial review without remanding the case if no hearing was held by the agency, and the court finds that remand to the agency would be unlikely to result in a better record for review and the interests of economy and efficiency would be served by receiving the evidence itself. This subdivision does not apply to judicial review of rulemaking.

(d) If jurisdiction for judicial review is in the Supreme Court or court of appeal and the court is to receive evidence pursuant to this section, the court shall appoint a referee, master, or trial court judge for this purpose, having due regard for the convenience of the parties.

(e) Nothing in this section precludes the court from taking judicial notice of a decision designated by the agency as a precedent decision pursuant to Section 11425.60 of the Government Code.

Comment. Subdivision (a) of Section 1123.850 supersedes former Section 1094.5(e), which permitted the court to admit evidence without remanding the case in cases in which the court was authorized by law to exercise its independent judgment on the evidence. Under this section and Section 1123.810, the court is limited to evidence in the administrative record except under subdivision (b). The provision in subdivision (a) permitting new evidence that could not in the exercise of reasonable diligence have been produced in the administrative proceeding should be narrowly construed. Such evidence is admissible only in rare instances. See *Western States Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559, 578, 888 P.2d 1268, 1278, 38 Cal. Rptr. 2d 139, 149 (1995). For rulemaking, no evidence is admissible that was not in existence at the time of the agency proceeding. Gov't Code § 11350 (state agency rulemaking under the Administrative Procedure Act); *Western States Petroleum Ass'n v. Superior Court*, *supra* (quasi-legislative action generally).

Subdivision (b)(1) is drawn from 1981 Model State APA Section 5-114(a)(1)-(2). Evidence may be received only if it is likely to contribute to the court's determination of the validity of agency action under one or more of the standards set forth in Sections 1123.410-1123.460.

Subdivision (b)(2) applies to judicial review of agency interpretation of law under Section 1123.420, and to factfinding in local agency proceedings to which the independent judgment standard applies under Section 1123.440. Admission of evidence under this provision is discretionary with the court.

As used in subdivision (c), "hearing" includes both informal and formal hearings.

Subdivision (d) is drawn from 1981 Model State APA Section 5-104(c), alternative B. Statutes that provide for judicial review in the court of appeal or Supreme Court are: Bus. & Prof. Code § 23090 (Alcoholic Beverage Control Appeals Board and Department of Alcoholic Beverage Control); Gov't Code §§ 3520(c), 3542(c), 3564(c) (Public Employment Relations Board); Lab. Code §§ 1160.8 (Agricultural Labor Relations Board), 5950 (Workers' Compensation Appeals Board).

Section 1123.850 deals only with admissibility of new evidence on issues involved in the agency proceeding. It does not limit evidence on issues unique to judicial review, such as petitioner's standing or capacity,

or affirmative defenses such as laches for unreasonable delay in seeking judicial review. For standing rules, see Sections 1123.210-1123.250.

Section 1123.850 does not address the question of whether the evidence must have been in existence at the time of the agency proceeding. For state agency rulemaking, this is governed by Government Code Section 11350. For other action, it is governed by case law. See, e.g., *Western States Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559, 578, 888 P.2d 1268, 1278, 38 Cal. Rptr. 2d 139, 149 (1995) (quasi-legislative action); *Elizabeth D. v. Zolin*, 21 Cal. App. 4th 347, 356-57, 25 Cal. Rptr. 2d 852, 856-57 (1993) (administrative adjudication); *Toyota of Visalia, Inc. v. New Motor Vehicle Bd.*, 188 Cal. App. 3d 872, 881-82, 233 Cal. Rptr. 708 (1987) (same); *Windigo Mills v. Unemployment Ins. Appeals Bd.*, 92 Cal. App. 3d 586, 596-97, 155 Cal. Rptr. 63 (1979) (same).

Subdivision (e) makes clear this section does not prevent the court from taking judicial notice of a precedent decision. See Evid. Code § 452.

For a special rule requiring the court to consider all relevant evidence, see Water Code § 1813. This special rule prevails over Section 1123.850. See Section 1121.120 (conflicting or inconsistent statute controls).

Article 9. Costs and Fees

§ 1123.910. Fee for transcript and preparation and certification of record

1123.910. The agency preparing the administrative record for judicial review shall charge the petitioner the fee provided in Section 69950 of the Government Code for the transcript, if any, and the reasonable cost of preparation of other portions of the record and certification of the record.

Comment. Section 1123.910 continues the substance of a portion of the fourth sentence of former Section 11523 of the Government Code, the third sentence of subdivision (a) of former Code of Civil Procedure Section 1094.5, and the second sentence of subdivision (c) of former Code of Civil Procedure Section 1094.6.

§ 1123.920. Recovery of costs of suit

1123.920. Except as otherwise provided by rules of court adopted by the Judicial Council, the prevailing party is

entitled to recover the following costs of suit borne by the party:

- (a) The cost of preparing the transcript, if any.
- (b) The cost of compiling and certifying the record.
- (c) Any filing fee.
- (d) Fees for service of documents on the other parties.

Comment. Section 1123.920 supersedes the sixth sentence of subdivision (a) of former Section 1094.5, and the fifth and tenth sentences of former Section 11523 of the Government Code. Section 1123.920 generalizes these provisions to apply to all proceedings for judicial review of agency action. See also Bus. & Prof. Code § 125.3 (recovery of costs of investigation and enforcement in a disciplinary proceeding by a board in the Department of Consumer Affairs or the Osteopathic Medical Board).

§ 1123.930. No renewal or reinstatement of license on failure to pay costs

1123.930. No license of a petitioner for judicial review of a decision in an adjudicative proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code shall be renewed or reinstated if the petitioner fails to pay all of the costs required under Section 1123.920.

Comment. Section 1123.930 continues the substance of a portion of the sixth sentence of former Section 11523 of the Government Code.

§ 1123.940. Proceedings in forma pauperis

1123.940. Notwithstanding any other provision of this article, if the petitioner has proceeded pursuant to Section 68511.3 of the Government Code and the rules of court implementing that section and if the transcript is necessary to a proper review of an adjudicative proceeding, the cost of preparing the transcript shall be borne by the agency.

Comment. Section 1123.940 continues the substance of the fourth sentence of subdivision (a) of former Section 1094.5 (proceedings in forma pauperis).

§ 1123.950. Attorney fees in action to review administrative proceeding

1123.950. (a) If it is shown that an agency decision under state law was the result of arbitrary or capricious action or conduct by an agency or officer in an official capacity, the petitioner if the petitioner prevails on judicial review may collect reasonable attorney's fees, computed at one hundred dollars (\$100) per hour, but not to exceed seven thousand five hundred dollars (\$7,500), where the petitioner is personally obligated to pay the fees, from the agency, in addition to any other relief granted or other costs awarded.

(b) This section is ancillary only, and does not create a new cause of action.

(c) Refusal by an agency or officer to admit liability pursuant to a contract of insurance is not arbitrary or capricious action or conduct within the meaning of this section.

(d) This section does not apply to judicial review of actions of the State Board of Control or of a private hospital board.

Comment. Section 1123.950 continues former Government Code Section 800. See also Sections 1121.230 ("agency" defined), 1121.250 ("decision" defined).

SELECTED CONFORMING REVISIONS

STATE BAR COURT

Bus. & Prof. Code § 6089 (added). Inapplicability of Code of Civil Procedure

6089. Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure does not apply to judicial review of proceedings of the State Bar Court.

Comment. Section 6089 makes clear the judicial review provisions in the Code of Civil Procedure do not apply to the State Bar Court.

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

Bus. & Prof. Code § 23090 (amended). Jurisdiction

23090. Any person affected by a final order of the board, including the department, may, ~~within the time limit specified in this section, apply to~~ *petition* the Supreme Court or to the court of appeal for the appellate district in which the proceeding arose, for a writ of *judicial* review of such *the* final order. ~~The application for writ of review shall be made within 30 days after filing of the final order of the board.~~

Comment. Section 23090 is amended to change the application for a writ of review to a petition for judicial review, consistent with Code of Civil Procedure Section 1123.610, and to delete the 30-day time limit formerly prescribed in this section. Under Code of Civil Procedure Section 1123.630, the petition for review must be filed not later than 30 days after the decision is effective. A decision is effective 30 days after it is delivered or mailed to the respondent, unless the agency orders that it shall become effective sooner. Gov't Code § 11519.

Bus. & Prof. Code § 23090.1 (repealed). Writ of review

~~23090.1. The writ of review shall be made returnable at a time and place then or thereafter specified by court order and shall direct the board to certify the whole record of the~~

~~department in the case to the court within the time specified. No new or additional evidence shall be introduced in such court, but the cause shall be heard on the whole record of the department as certified to by the board.~~

Comment. Section 23090.1 is repealed because it is superseded by the judicial review provisions of the Code of Civil Procedure. See Section 23090.4. The provision in the first sentence for the return of the writ of review is superseded by Code of Civil Procedure Section 1123.710 (applicability of rules of practice for civil actions). The provision in the first sentence for the record of the department is superseded by Code of Civil Procedure Section 1123.820 (contents of administrative record). The second sentence is superseded by Code of Civil Procedure Sections 1123.810 (administrative record exclusive basis for judicial review) and 1123.850 (new evidence on judicial review).

Bus. & Prof. Code § 23090.2 (repealed). Scope of review

~~23090.2. The review by the court shall not extend further than to determine, based on the whole record of the department as certified by the board, whether:~~

~~(a) The department has proceeded without or in excess of its jurisdiction.~~

~~(b) The department has proceeded in the manner required by law.~~

~~(c) The decision of the department is supported by the findings.~~

~~(d) The findings in the department's decision are supported by substantial evidence in the light of the whole record.~~

~~(e) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced at the hearing before the department.~~

~~Nothing in this article shall permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence.~~

Comment. Subdivisions (a) through (d) of former Section 23090.2 are superseded by Code of Civil Procedure Sections 1123.410-1123.460 and 1123.160. Subdivision (e) is superseded by Code of Civil Procedure Section 1123.850. The last sentence is superseded by Code of Civil

Procedure Sections 1123.420 (interpretation of law), 1123.430 (factfinding), 1123.810 (administrative record exclusive basis for judicial review), and 1123.850 (new evidence on judicial review). Nothing in the Code of Civil Procedure or in this article permits the court to hold a trial de novo.

Bus. & Prof. Code § 23090.3 (amended). Right to appear in judicial review proceeding

~~23090.3. The findings and conclusions of the department on questions of fact are conclusive and final and are not subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the department. The parties to a judicial review proceeding are the board, the department, and each party to the action or proceeding before the board shall have the right to appear in the review proceeding. Following the hearing, the court shall enter judgment either affirming or reversing the decision of the department, or the court may remand the case for further proceedings before or reconsideration by the department whose interest is adverse to the person seeking judicial review.~~

Comment. Section 23090.3 is largely superseded by the judicial review provisions of the Code of Civil Procedure. See Section 23090.4. The first sentence is superseded by Code of Civil Procedure Section 1123.430 (review of agency factfinding). The second sentence is superseded by Code of Civil Procedure Section 1123.420 (interpretation of law). The fourth sentence is superseded by Code of Civil Procedure Section 1123.730 (type of relief).

Bus. & Prof. Code § 23090.4 (amended). Judicial review

~~23090.4. The provisions of the Code of Civil Procedure relating to writs of review shall, insofar as applicable, apply to proceedings in the courts as provided by this article. A copy of every pleading filed pursuant to this article shall be served on the board, the department, and on each party who entered an appearance before the board. Judicial review shall~~

be under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.

Comment. Section 23090.4 is amended to delete the first sentence, and to replace it with a reference to the judicial review provisions of the Code of Civil Procedure. Special provisions of this article prevail over general provisions of the Code of Civil Procedure governing judicial review. See Code Civ. Proc. § 1121.110 (conflicting or inconsistent statute controls). Copies of pleadings in judicial review proceedings must be served on the parties. See Code Civ. Proc. §§ 1123.610 (petition for review), 1123.710 (applicability of rules of practice for civil actions).

Bus. & Prof. Code § 23090.5 (amended). Courts having jurisdiction

23090.5. No court of this state, except the Supreme Court and the courts of appeal to the extent specified in this article, shall have jurisdiction to review, affirm, reverse, correct, or annul any order, rule, or decision of the department or to suspend, stay, or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the department in the performance of its duties, ~~but a writ of mandate shall lie from the Supreme Court or the courts of appeal in any proper case.~~

Comment. Section 23090.5 is amended to delete the former reference to a writ of mandate. The writ of mandate has been replaced by a petition for review. See Section 23090.4; Code Civ. Proc. § 1123.610 (petition for review). *But cf.* Code Civ. Proc. § 1123.510(b) (original jurisdiction of Supreme Court or courts of appeal under California Constitution not affected).

Bus. & Prof. Code § 23090.6 (repealed). Stay of order

~~23090.6. The filing of a petition for, or the pendency of, a writ of review shall not of itself stay or suspend the operation of any order, rule, or decision of the department, but the court before which the petition is filed may stay or suspend, in whole or in part, the operation of the order, rule, or decision of the department subject to review, upon the terms and conditions which it by order directs.~~

Comment. Former Section 23090.6 is superseded by Code of Civil Procedure Section 1123.720 (stays). See Section 23090.4.

Bus. & Prof. Code § 23090.7 (amended). Effectiveness of order

23090.7. ~~No~~ *Except for the purpose of Section 1123.630 of the Code of Civil Procedure, no decision of the department which has been appealed to the board and no final order of the board shall become effective during the period in which application a petition for review may be made for a writ of review, as provided by Section 23090.*

Comment. Section 23090.7 is amended to add the “except” clause. Section 23090.7 is also amended to recognize that judicial review under the Code of Civil Procedure has been substituted for a writ of review under this article. See Section 23090.4.

TAXPAYER ACTIONS**Code Civ. Proc. § 526a (amended). Taxpayer actions**

526a. ~~An action to obtain a judgment, restraining and preventing any~~ *(a) A proceeding for judicial review of agency action to restrain or prevent illegal expenditure of, waste of, or injury to the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. under Title 2 (commencing with Section 1120) of Part 3.*

(b) This section does not affect any right of action in favor of a county, city, town, or city and county, or any public officer; provided that no injunction shall be granted restraining the offering for sale, sale, or issuance of any municipal bonds for public improvements or public utilities.

~~An action~~ *(c) A proceeding brought pursuant to this section to enjoin a public improvement project shall take special precedence over all civil matters on the calendar of the court*

except those matters to which equal precedence on the calendar is granted by law.

Comment. Section 526a is amended to make the former statutory and common law taxpayers' action subject to the judicial review provisions of this code. See Sections 1120-1123.950. Under the judicial review provisions, the petitioner must show entitlement to relief on a ground specified in Sections 1123.410-1123.460. See Section 1123.160. The petition for review must name the agency as respondent or the agency head by title, not individual employees of the agency. Section 1123.610. Standing rules are provided in Sections 1123.210-1123.250. Concerning the common law taxpayers' action, see *Los Angeles v. Superior Court*, 50 Cal. App. 4th 598, 57 Cal. Rptr. 2d 878, 885 (1996).

VALIDATING PROCEEDINGS

Code Civ. Proc. § 871 (added). Inapplicability of Title 2 of Part 3

871. Title 2 (commencing with Section 1120) of Part 3 does not apply to proceedings under this chapter.

Comment. Section 871 makes clear the judicial review provisions in Title 2 of Part 3 do not apply to proceedings under this chapter.

WRIT OF MANDATE

Code Civ. Proc. § 1085 (amended). Writ of mandate

1085. It *(a) Subject to subdivision (b), a writ of mandate may be issued by any court, except a municipal or justice court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he the party is entitled, and from which he the party is unlawfully precluded by such the inferior tribunal, corporation, board or person.*

(b) Judicial review of agency action to which Title 2 (commencing with Section 1120) applies shall be under that title, and not under this chapter.

Comment. Section 1085 is amended to add subdivision (b) and to make other technical revisions. The former reference to a justice court is deleted, because justice courts have been abolished. See Cal. Const. art. VI, § 1.

Code Civ. Proc. § 1085.5 (repealed). Action of Director of Food and Agriculture

~~1085.5. Notwithstanding this chapter, in any action or proceeding to attack, review, set aside, void, or annul the activity of the Director of Food and Agriculture under Division 4 (commencing with Section 5001) or Division 5 (commencing with Section 9101) of the Food and Agricultural Code, the procedure for issuance of a writ of mandate shall be in accordance with Chapter 1.5 (commencing with Section 5051) of Part 1 of Division 4 of that code.~~

Comment. Section 1085.5 is repealed as obsolete, since Sections 5051-5064 of the Food and Agricultural Code have been repealed.

Code Civ. Proc. § 1094.5 (repealed). Administrative mandamus

~~1094.5. (a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board, or officer may be filed with the petition, may be filed with respondent's points and authorities, or may be ordered to be filed by the court. Except when otherwise prescribed by statute, the cost of preparing the record shall be borne by the petitioner. Where the petitioner has proceeded pursuant to Section 68511.3 of the Government Code and the Rules of Court implementing that section and where the transcript is necessary to a proper review of the administrative~~

proceedings, the cost of preparing the transcript shall be borne by the respondent. Where the party seeking the writ has proceeded pursuant to Section 1088.5, the administrative record shall be filed as expeditiously as possible, and may be filed with the petition, or by the respondent after payment of the costs by the petitioner, where required, or as otherwise directed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, the expense shall be taxable as costs.

(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) Notwithstanding subdivision (c), in cases arising from private hospital boards or boards of directors of districts organized pursuant to The Local Hospital District Law, Division 23 (commencing with Section 32000) of the Health and Safety Code or governing bodies of municipal hospitals formed pursuant to Article 7 (commencing with Section 37600) or Article 8 (commencing with Section 37650) of Chapter 5 of Division 3 of Title 4 of the Government Code, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the

light of the whole record. However, in all cases in which the petition alleges discriminatory actions prohibited by Section 1316 of the Health and Safety Code, and the plaintiff makes a preliminary showing of substantial evidence in support of that allegation, the court shall exercise its independent judgment on the evidence and abuse of discretion shall be established if the court determines that the findings are not supported by the weight of the evidence.

(e) Where the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (f) remanding the case to be reconsidered in the light of that evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit the evidence at the hearing on the writ without remanding the case.

(f) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the respondent.

(g) Except as provided in subdivision (h), the court in which proceedings under this section are instituted may stay the operation of the administrative order or decision pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration of the time for filing the notice, whichever occurs first. However, no such stay shall be imposed or continued if the court is satisfied that it is against the public interest; provided that the application for

the stay shall be accompanied by proof of service of a copy of the application on the respondent. Service shall be made in the manner provided by Title 5 (commencing with Section 405) of Part 2 or Chapter 5 (commencing with Section 1010) of Title 14 of Part 2. If an appeal is taken from a denial of the writ, the order or decision of the agency shall not be stayed except upon the order of the court to which the appeal is taken. However, in cases where a stay is in effect at the time of filing the notice of appeal, the stay shall be continued by operation of law for a period of 20 days from the filing of the notice. If an appeal is taken from the granting of the writ, the order or decision of the agency is stayed pending the determination of the appeal unless the court to which the appeal is taken shall otherwise order. Where any final administrative order or decision is the subject of proceedings under this section, if the petition shall have been filed while the penalty imposed is in full force and effect, the determination shall not be considered to have become moot in cases where the penalty imposed by the administrative agency has been completed or complied with during the pendency of the proceedings.

(h) (1) The court in which proceedings under this section are instituted may stay the operation of the administrative order or decision of any licensed hospital or any state agency made after a hearing required by statute to be conducted under the provisions of the Administrative Procedure Act, as set forth in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, conducted by the agency itself or an administrative law judge on the staff of the Office of Administrative Hearings pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration of the time for filing the notice, whichever occurs first. However, the stay shall not be imposed or continued unless the court is satisfied

~~that the public interest will not suffer and that the licensed hospital or agency is unlikely to prevail ultimately on the merits; and provided further that the application for the stay shall be accompanied by proof of service of a copy of the application on the respondent. Service shall be made in the manner provided by Title 5 (commencing with Section 405) of Part 2 or Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.~~

~~(2) The standard set forth in this subdivision for obtaining a stay shall apply to any administrative order or decision of an agency which issues licenses pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code or pursuant to the Osteopathic Initiative Act or the Chiropractic Initiative Act. With respect to orders or decisions of other state agencies, the standard in this subdivision shall apply only when the agency has adopted the proposed decision of the administrative law judge in its entirety or has adopted the proposed decision but reduced the proposed penalty pursuant to subdivision (b) of Section 11517 of the Government Code; otherwise the standard in subdivision (g) shall apply.~~

~~(3) If an appeal is taken from a denial of the writ, the order or decision of the hospital or agency shall not be stayed except upon the order of the court to which the appeal is taken. However, in cases where a stay is in effect at the time of filing the notice of appeal, the stay shall be continued by operation of law for a period of 20 days from the filing of the notice. If an appeal is taken from the granting of the writ, the order or decision of the hospital or agency is stayed pending the determination of the appeal unless the court to which the appeal is taken shall otherwise order. Where any final administrative order or decision is the subject of proceedings under this section, if the petition shall have been filed while the penalty imposed is in full force and effect, the~~

determination shall not be considered to have become moot in cases where the penalty imposed by the administrative agency has been completed or complied with during the pendency of the proceedings.

(i) Any administrative record received for filing by the clerk of the court may be disposed of as provided in Sections 1952, 1952.2, and 1952.3.

(j) Effective January 1, 1996, this subdivision shall apply only to state employees in State Bargaining Unit 5. For purposes of this section, the court is not authorized to review any disciplinary decisions reached pursuant to Section 19576.1 of the Government Code.

Comment. The portion of the first sentence of subdivision (a) of former Section 1094.5 relating to finality is superseded by Section 1123.120 (finality). The portion of the first sentence of former subdivision (a) relating to trial by jury is superseded by Section 1123.740. The second sentence of former subdivision (a) is superseded by Section 1123.710(a) (Judicial Council rules of pleading and practice). See also Sections 1123.830(c) (delivery of record) and 1123.840 (disposal of record). The third sentence of former subdivision (a) is superseded by Section 1123.910 (fee for preparing record). The fourth sentence of former subdivision (a) is continued in substance in Section 1123.940 (proceedings in forma pauperis). The fifth sentence of former subdivision (a) is superseded by Section 1123.710(a) (Judicial Council rules of pleading and practice). The sixth sentence of former subdivision (a) is superseded by Section 1123.920 (recovery of costs of suit).

The provision of subdivision (b) relating to review of whether the respondent has proceeded without or in excess of jurisdiction is superseded by Section 1123.420 (review of agency interpretation of law). The provision relating to whether there has been a fair trial is superseded by Section 1123.460 (review of agency procedure). The provision relating to whether there has been a prejudicial abuse of discretion is superseded by Section 1123.450 (review of agency exercise of discretion). The provision relating to proceeding in the manner required by law is superseded by Section 1123.460 (review of agency procedure). The provision relating to an order or decision not supported by findings or findings not supported by evidence is superseded by Section 1123.430 (review of agency factfinding).

Subdivision (c) is superseded by Section 1123.430 (review of agency factfinding).

Subdivision (d) is superseded by Health and Safety Code Sections 1339.62-1339.64.

Subdivision (e) is superseded by Section 1123.850 (new evidence on judicial review).

The first sentence and first portion of the second sentence of subdivision (f) is continued in Section 1123.730(c) (type of relief). The last portion of the second sentence of subdivision (f) is continued in substance in Section 1121.140 (exercise of agency discretion).

The first through sixth sentences of subdivision (g), and the first, second, and third sentences of subdivision (h)(3), are superseded by Section 1123.720 (stay). The seventh sentence of subdivision (g) and the fourth sentence of subdivision (h)(3) are continued in Section 1123.150 (proceeding not moot because penalty completed).

Subdivision (i) is continued without change in Section 1123.840 (disposal of administrative record).

Subdivision (j) is continued in Section 19576.1 of the Government Code.

Code Civ. Proc. § 1094.6 (repealed). Review of local agency decision

~~1094.6. (a) Judicial review of any decision of a local agency, other than school district, as the term local agency is defined in Section 54951 of the Government Code, or of any commission, board, officer or agent thereof, may be had pursuant to Section 1094.5 of this code only if the petition for writ of mandate pursuant to such section is filed within the time limits specified in this section.~~

~~(b) Any such petition shall be filed not later than the 90th day following the date on which the decision becomes final. If there is no provision for reconsideration of the decision, or for a written decision or written findings supporting the decision, in any applicable provision of any statute, charter, or rule, for the purposes of this section, the decision is final on the date it is announced. If the decision is not announced at the close of the hearing, the date, time, and place of the announcement of the decision shall be announced at the hearing. If there is a provision for reconsideration, the decision is final for purposes of this section upon the expiration of the period during which such reconsideration~~

can be sought; provided, that if reconsideration is sought pursuant to any such provision the decision is final for the purposes of this section on the date that reconsideration is rejected. If there is a provision for a written decision or written findings, the decision is final for purposes of this section upon the date it is mailed by first-class mail, postage prepaid, including a copy of the affidavit or certificate of mailing, to the party seeking the writ. Subdivision (a) of Section 1013 does not apply to extend the time, following deposit in the mail of the decision or findings, within which a petition shall be filed.

(c) The complete record of the proceedings shall be prepared by the local agency or its commission, board, officer, or agent which made the decision and shall be delivered to the petitioner within 190 days after he has filed a written request therefor. The local agency may recover from the petitioner its actual costs for transcribing or otherwise preparing the record. Such record shall include the transcript of the proceedings, all pleadings, all notices and orders, any proposed decision by a hearing officer, the final decision, all admitted exhibits, all rejected exhibits in the possession of the local agency or its commission, board, officer, or agent, all written evidence, and any other papers in the case.

(d) If the petitioner files a request for the record as specified in subdivision (c) within 10 days after the date the decision becomes final as provided in subdivision (b), the time within which a petition pursuant to Section 1094.5 may be filed shall be extended to not later than the 30th day following the date on which the record is either personally delivered or mailed to the petitioner or his attorney of record, if he has one.

(e) As used in this section, decision means a decision subject to review pursuant to Section 1094.5, suspending, demoting, or dismissing an officer or employee, revoking, or denying an application for a permit, license, or other

~~entitlement, or denying an application for any retirement benefit or allowance.~~

~~(f) In making a final decision as defined in subdivision (e), the local agency shall provide notice to the party that the time within which judicial review must be sought is governed by this section.~~

~~As used in this subdivision, “party” means an officer or employee who has been suspended, demoted or dismissed; a person whose permit, license, or other entitlement has been revoked or suspended, or whose application for a permit, license, or other entitlement has been denied; or a person whose application for a retirement benefit or allowance has been denied.~~

~~(g) This section shall prevail over any conflicting provision in any otherwise applicable law relating to the subject matter, unless the conflicting provision is a state or federal law which provides a shorter statute of limitations, in which case the shorter statute of limitations shall apply.~~

Comment. Subdivision (a) and the first sentence of subdivision (b) of former Section 1094.6 is superseded by Sections 1121.230 (“agency” defined), 1121.260 (“local agency” defined), 1123.640 (time for filing petition for review), 1123.120 (finality), and 1123.140 (exception to finality requirement). The second, fourth, and fifth sentences of subdivision (b) are superseded by Section 1123.120. The third sentence of subdivision (b) is continued in Government Code Section 54962(b).

The first sentence of subdivision (c) is superseded by Section 1123.830 (preparation of the record). The second sentence of subdivision (c) is superseded by Section 1123.910 (fee for preparing record). The third sentence of subdivision (c) is superseded by Code of Civil Procedure Section 1123.820 (contents of administrative record).

Subdivision (d) is superseded by Section 1123.640 (time for filing petition for review).

Subdivision (e) is superseded by Section 1121.250 (“decision” defined). See also Gov’t Code § 54962(a).

Subdivision (f) is continued in Sections 1123.640 (time for filing petition for review) and 1121.270 (“party” defined). Subdivision (g) is not continued.

COMMISSION ON PROFESSIONAL COMPETENCE

Educ. Code § 44945 (amended). Judicial review

44945. The decision of the Commission on Professional Competence may, on petition of either the governing board or the employee, be reviewed by a court of competent jurisdiction ~~in the same manner as a decision made by a hearing officer under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. The court, on review, shall exercise its independent judgment on the evidence~~ *under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure*. The proceeding shall be set for hearing at the earliest possible date and shall take precedence over all other cases, except older matters of the same character and matters to which special precedence is given by law.

Comment. Section 44945 is amended to make judicial review under this section subject to the provisions for judicial review in the Code of Civil Procedure. The former second sentence of Section 44945 is superseded by the standards of review in Code of Civil Procedure Sections 1123.410-1123.460.

BOARD OF GOVERNORS OF CALIFORNIA COMMUNITY COLLEGES

Educ. Code § 87682 (amended). Judicial review

87682. The decision of the arbitrator or administrative law judge, as the case may be, may, on petition of either the governing board or the employee, be reviewed by a court of competent jurisdiction ~~in the same manner as a decision made by an administrative law judge under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. The court, on review, shall exercise its independent judgment on the evidence~~ *under Title 2 (commencing with Section 1120) of Part 3 of the Code of*

Civil Procedure. The proceeding shall be set for hearing at the earliest possible date and shall take precedence over all other cases, except older matters of the same character and matters to which special precedence is given by law.

Comment. Section 87682 is amended to make judicial review under this section subject to the provisions for judicial review in the Code of Civil Procedure. The former second sentence of Section 87682 is superseded by the standards of review in Code of Civil Procedure Sections 1123.410-1123.460.

COSTS IN CIVIL ACTIONS RESULTING FROM ADMINISTRATIVE PROCEEDINGS

Gov't Code § 800 (repealed). Costs in action to review administrative proceeding

~~800. In any civil action to appeal or review the award, finding, or other determination of any administrative proceeding under this code or under any other provision of state law, except actions resulting from actions of the State Board of Control, where it is shown that the award, finding, or other determination of the proceeding was the result of arbitrary or capricious action or conduct by a public entity or an officer thereof in his or her official capacity, the complainant if he or she prevails in the civil action may collect reasonable attorney's fees, computed at one hundred dollars (\$100) per hour, but not to exceed seven thousand five hundred dollars (\$7,500), where he or she is personally obligated to pay the fees, from the public entity, in addition to any other relief granted or other costs awarded.~~

~~This section is ancillary only, and shall not be construed to create a new cause of action.~~

~~Refusal by a public entity or officer thereof to admit liability pursuant to a contract of insurance shall not be considered arbitrary or capricious action or conduct within the meaning of this section.~~

Comment. Former Section 800 is continued in Code of Civil Procedure Section 1123.950.

PUBLIC EMPLOYMENT RELATIONS BOARD

Gov't Code § 3520 (amended). Judicial review of unit determination or unfair practice case

3520. (a) Judicial review of a unit determination shall only be allowed: (1) when the board, in response to a petition from the state or an employee organization, agrees that the case is one of special importance and joins in the request for such review; or (2) when the issue is raised as a defense to an unfair practice complaint. A board order directing an election shall not be stayed pending judicial review.

Upon receipt of a board order joining in the request for judicial review, a party to the case may petition for ~~a writ of extraordinary relief from review of~~ the unit determination decision or order.

(b) Any charging party, respondent, or intervenor aggrieved by a final decision or order of the board in an unfair practice case, except a decision of the board not to issue a complaint in such a case, may petition for ~~a writ of extraordinary relief from such review of the~~ decision or order.

(c) ~~Such~~ *The* petition shall be filed in the ~~district~~ court of appeal in the appellate district where the unit determination or unfair practice dispute occurred. ~~The petition shall be filed within 30 days after issuance of the board's final order, order denying reconsideration, or order joining in the request for judicial review, as applicable.~~ Upon the filing of such *the* petition, the court shall cause notice to be served upon the board and thereupon shall have jurisdiction of the proceeding. The board shall file in the court the record of the proceeding, certified by the board, within 10 days after the clerk's notice unless ~~such~~ *the* time is extended by the court for good cause shown. The court shall have jurisdiction to grant to the board

~~such any~~ temporary relief or restraining order it deems just and proper and in like manner to make and enter a decree enforcing, modifying, or setting aside the order of the board. ~~The findings of the board with respect to questions of fact, including ultimate facts, if supported by substantial evidence on the record considered as a whole, shall be conclusive.~~ The provisions of ~~Title 1 (commencing with Section 1067)~~ *Title 2 (commencing with Section 1120)* of Part 3 of the Code of Civil Procedure ~~relating to writs~~ shall, except where specifically superseded herein, apply to proceedings pursuant to this section.

(d) If the time to petition for ~~extraordinary relief from judicial review~~ of a board decision has expired, the board may seek enforcement of any final decision or order in a district court of appeal or a superior court in the *appellate* district where the unit determination or unfair practice case occurred. If, after hearing, the court determines that the order was issued pursuant to procedures established by the board and that the person or entity refuses to comply with the order, the court shall enforce ~~such the~~ order by ~~writ of mandamus appropriate process~~. The court shall not review the merits of the order.

Comment. Section 3520 is amended to make judicial review of the Public Employment Relations Board subject to the provisions for judicial review in the Code of Civil Procedure, except as provided in this section. The board is exempt from the provision in the Code of Civil Procedure governing standard of review of questions of law, so existing case law will continue to apply to the board. See Code Civ. Proc. § 1123.420(b) & Comment.

The former second sentence of subdivision (c) which required the petition to be filed within 30 days after issuance of the board's final order, order denying reconsideration, or order joining in the request for judicial review, is superseded by Code of Civil Procedure Section 1123.630. Under that section, the petition for review must be filed not later than 30 days after the decision is effective. A decision is effective 30 days after it is delivered or mailed to the respondent, unless the

agency orders that it shall become effective sooner. Code Civ. Proc. § 1123.630(b)(2).

Gov't Code § 3542 (amended). Review of unit determination

3542. (a) No employer or employee organization shall have the right to judicial review of a unit determination except: (1) when the board in response to a petition from an employer or employee organization, agrees that the case is one of special importance and joins in the request for such review; or (2) when the issue is raised as a defense to an unfair practice complaint. A board order directing an election shall not be stayed pending judicial review.

Upon receipt of a board order joining in the request for judicial review, a party to the case may petition for ~~a writ of extraordinary relief from~~ *judicial review of* the unit determination decision or order.

(b) Any charging party, respondent, or intervenor aggrieved by a final decision or order of the board in an unfair practice case, except a decision of the board not to issue a complaint in such a case, may petition for ~~a writ of extraordinary relief from such~~ *judicial review of the* decision or order.

(c) ~~Such~~ *The* petition shall be filed in the ~~district~~ court of appeal in the appellate district where the unit determination or unfair practice dispute occurred. ~~The petition shall be filed within 30 days after issuance of the board's final order, order denying reconsideration, or order joining in the request for judicial review, as applicable.~~ Upon the filing of ~~such~~ *the* petition, the court shall cause notice to be served upon the board and thereupon shall have jurisdiction of the proceeding. The board shall file in the court the record of the proceeding, certified by the board, within 10 days after the clerk's notice unless ~~such~~ *the* time is extended by the court for good cause shown. The court shall have jurisdiction to grant to the board ~~such~~ *any* temporary relief or restraining order it deems just and proper and in like manner to make and enter a decree

enforcing, modifying, or setting aside the order of the board. ~~The findings of the board with respect to questions of fact, including ultimate facts, if supported by substantial evidence on the record considered as a whole, are conclusive.~~ The provisions of ~~Title 1 (commencing with Section 1067)~~ *Title 2 (commencing with Section 1120)* of Part 3 of the Code of Civil Procedure ~~relating to writs~~ shall, except where specifically superseded herein, apply to proceedings pursuant to this section.

(d) If the time to petition for ~~extraordinary relief from judicial review of~~ a board decision has expired, the board may seek enforcement of any final decision or order in a district court of appeal or a superior court in the *appellate* district where the unit determination or unfair practice case occurred. The board shall respond within 10 days to any inquiry from a party to the action as to why the board has not sought court enforcement of the final decision or order. If the response does not indicate that there has been compliance with the board's final decision or order, the board shall seek enforcement of the final decision or order upon the request of the party. The board shall file in the court the record of the proceeding, certified by the board, and appropriate evidence disclosing the failure to comply with the decision or order. If, after hearing, the court determines that the order was issued pursuant to procedures established by the board and that the person or entity refuses to comply with the order, the court shall enforce ~~such~~ *the* order by ~~writ of mandamus~~ *appropriate process*. The court shall not review the merits of the order.

Comment. Section 3542 is amended to make judicial review of the Public Employment Relations Board subject to the provisions for judicial review in the Code of Civil Procedure, except as provided in this section. Special provisions of this section prevail over general provisions of the Code of Civil Procedure governing judicial review. See Code of Civil Procedure Section 1121.110 (conflicting or inconsistent statute controls). The board is exempt from the provision in the Code of Civil Procedure governing standard of review of questions of law, so existing case law

will continue to apply to the board. See Code Civ. Proc. § 1123.420(b) & Comment.

The former second sentence of subdivision (c) which required the petition to be filed within 30 days after issuance of the board's final order, order denying reconsideration, or order joining in the request for judicial review, is superseded by Code of Civil Procedure Section 1123.630. Under that section, the petition for review must be filed not later than 30 days after the decision is effective. A decision is effective 30 days after it is delivered or mailed to the respondent, unless the agency orders that it shall become effective sooner. Code Civ. Proc. § 1123.630(b)(2).

Gov't Code § 3564 (amended). Judicial review of unit determination or unfair practice case

3564. (a) No employer or employee organization shall have the right to judicial review of a unit determination except: (1) when the board in response to a petition from an employer or employee organization, agrees that the case is one of special importance and joins in the request for such review; or (2) when the issue is raised as a defense to an unfair practice complaint. A board order directing an election shall not be stayed pending judicial review.

Upon receipt of a board order joining in the request for judicial review, a party to the case may petition for ~~a writ of extraordinary relief~~ from *judicial review of* the unit determination decision or order.

(b) Any charging party, respondent, or intervenor aggrieved by a final decision or order of the board in an unfair practice case, except a decision of the board not to issue a complaint in such a case, may petition for ~~a writ of extraordinary relief~~ from such *judicial review of the* decision or order.

(c) Such *The* petition shall be filed in the district court of appeal in the appellate district where the unit determination or unfair practice dispute occurred. ~~The petition shall be filed within 30 days after issuance of the board's final order, order denying reconsideration, or order joining in the request for judicial review, as applicable.~~ Upon the filing of such *the*

petition, the court shall cause notice to be served upon the board and thereupon shall have jurisdiction of the proceeding. The board shall file in the court the record of the proceeding, certified by the board, within 10 days after the clerk's notice unless such *the* time is extended by the court for good cause shown. The court shall have jurisdiction to grant to the board such *any* temporary relief or restraining order it deems just and proper and in like manner to make and enter a decree enforcing, modifying, or setting aside the order of the board. ~~The findings of the board with respect to questions of fact, including ultimate facts, if supported by substantial evidence on the record considered as a whole, are conclusive.~~ The provisions of ~~Title 1 (commencing with Section 1067)~~ *Title 2 (commencing with Section 1120)* of Part 3 of the Code of Civil Procedure relating to writs shall, except where specifically superseded herein, apply to proceedings pursuant to this section.

(d) If the time to petition for ~~extraordinary relief from judicial review of~~ a board decision has expired, the board may seek enforcement of any final decision or order in a district court of appeal or a superior court in the *appellate* district where the unit determination or unfair practice case occurred. If, after hearing, the court determines that the order was issued pursuant to procedures established by the board and that the person or entity refuses to comply with the order, the court shall enforce such *the* order by writ of ~~mandamus appropriate process~~. The court shall not review the merits of the order.

Comment. Section 3564 is amended to make judicial review of the Public Employment Relations Board subject to the provisions for judicial review in the Code of Civil Procedure. The board is exempt from the provision in the Code of Civil Procedure governing standard of review of questions of law, so existing case law will continue to apply to the board. See Code Civ. Proc. § 1123.420(b) & Comment.

The former second sentence of subdivision (c) which required the petition to be filed within 30 days after issuance of the board's final

order, order denying reconsideration, or order joining in the request for judicial review, is superseded by Code of Civil Procedure Section 1123.630. Under that section, the petition for review must be filed not later than 30 days after the decision is effective. A decision is effective 30 days after it is delivered or mailed to the respondent, unless the agency orders that it shall become effective sooner. Code Civ. Proc. § 1123.630(b)(2).

ADMINISTRATIVE PROCEDURE ACT — RULEMAKING

Gov't Code § 11350 (amended). Judicial declaration on validity of regulation

11350. (a) ~~Any interested~~ *Except as provided in subdivisions (d) and (e),* a person may obtain a judicial declaration as to the validity of any regulation ~~by bringing an action for declaratory relief in the superior court in accordance with~~ *under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.* ~~The right to a judicial determination shall not be affected either by the failure to petition or to seek reconsideration of a petition filed pursuant to Section 11347.1 before the agency promulgating the regulations.~~ The regulation may be declared to be invalid for a substantial failure to comply with this chapter, or, in the case of an emergency regulation or order to repeal, upon the ground that the facts recited in the statement do not constitute an emergency within the provisions of Section 11346.1.

(b) In addition to any other ground that may exist, a regulation may be declared invalid if either of the following exists:

(1) The agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute, court decision, or other provision of law that is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence.

(2) The agency declaration pursuant to paragraph (8) of subdivision (a) of Section 11346.5 is in conflict with substantial evidence in the record.

~~For purposes of this section, the record shall be deemed to consist of all material maintained in the file of the rulemaking proceeding as defined in Section 11347.3.~~

(c) The approval of a regulation by the office or the Governor's overruling of a decision of the office disapproving a regulation shall not be considered by a court in ~~any action for declaratory relief brought with respect to a proceeding for~~ *judicial review of a regulation.*

(d) Notwithstanding Sections 1123.820 and 1123.850 of the Code of Civil Procedure, on judicial review:

(1) The court may not require the agency to add to the administrative record an explanation of reasons for a regulation.

(2) No evidence is admissible that was not in existence at the time of the agency proceeding under this chapter.

(e) Section 1123.460 of the Code of Civil Procedure does not apply to a proceeding under this section.

Comment. Section 11350 is amended to recognize that judicial review of agency regulations is now accomplished under Title 2 of Part 3 of the Code of Civil Procedure. The former second sentence of subdivision (a) is continued in Code of Civil Procedure Section 1123.330 (judicial review of rulemaking). The former second sentence of subdivision (b)(2) is continued in Code of Civil Procedure Section 1123.820(b) (contents of administrative record).

Subdivision (d) codifies one aspect of *Western States Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559, 578, 888 P.2d 1268, 1278, 38 Cal. Rptr. 2d 139, 149 (1995), and is consistent with Section 11347.3 which prescribes the contents of the rulemaking file and requires an affidavit of an agency official that the record is complete and the date on which the record was closed.

ADMINISTRATIVE PROCEDURE ACT — ADJUDICATION

Gov't Code § 11420.10 (amended). ADR authorized

11420.10. (a) An agency, with the consent of all the parties, may refer a dispute that is the subject of an adjudicative proceeding for resolution by any of the following means:

(1) Mediation by a neutral mediator.

(2) Binding arbitration by a neutral arbitrator. An award in a binding arbitration is subject to judicial review in the manner provided in Chapter 4 (commencing with Section 1285) of Title 9 of Part 3 of the Code of Civil Procedure. *Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure does not apply to judicial review of an award in binding arbitration under this section.*

(3) Nonbinding arbitration by a neutral arbitrator. The arbitrator's decision in a nonbinding arbitration is final unless within 30 days after the arbitrator delivers the award to the agency head a party requests that the agency conduct a de novo adjudicative proceeding. If the decision in the de novo proceeding is not more favorable to the party electing the de novo proceeding, the party shall pay the costs and fees specified in Section 1141.21 of the Code of Civil Procedure insofar as applicable in the adjudicative proceeding.

(b) If another statute requires mediation or arbitration in an adjudicative proceeding, that statute prevails over this section.

(c) This section does not apply in an adjudicative proceeding to the extent an agency by regulation provides that this section is not applicable in a proceeding of the agency.

Comment. Section 11420.10 is amended to make clear the judicial review provisions of the Code of Civil Procedure do not apply to binding arbitration under this section.

Gov't Code § 11425.50 (amended). Decision

11425.50. (a) The decision shall be in writing and shall include a statement of the factual and legal basis for the decision as to each of the principal controverted issues.

(b) The statement of the factual basis for the decision may be in the language of, or by reference to, the pleadings. If the statement is no more than mere repetition or paraphrase of the relevant statute or regulation, the statement shall be accompanied by a concise and explicit statement of the underlying facts of record that support the decision. If the factual basis for the decision includes a determination of *the presiding officer* based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on ~~judicial~~ *administrative* review the ~~court~~ *agency* shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it.

(c) The statement of the factual basis for the decision shall be based exclusively on the evidence of record in the proceeding and on matters officially noticed in the proceeding. The presiding officer's experience, technical competence, and specialized knowledge may be used in evaluating evidence.

(d) Nothing in this section limits the information that may be contained in the decision, including a summary of evidence relied on.

(e) A penalty may not be based on a guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule unless it has been adopted as a regulation pursuant to Chapter 3.5 (commencing with Section 11340).

Comment. Subdivision (b) of Section 11425.50 is amended to apply to the reviewing agency the requirement that great weight be given to

factual determinations of the presiding officer based on credibility, consistent with requiring the court on judicial review to do the same. The former requirement in subdivision (b) that the court give great weight on judicial review to determinations of the presiding officer based on credibility is continued in Code of Civil Procedure Section 1123.430(b).

Subdivision (b) requires the agency to give great weight to factual determinations, but not to application of law to fact.

Gov't Code § 11523 (repealed). Judicial review

~~11523. Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure, subject, however, to the statutes relating to the particular agency. Except as otherwise provided in this section, the petition shall be filed within 30 days after the last day on which reconsideration can be ordered. The right to petition shall not be affected by the failure to seek reconsideration before the agency. On request of the petitioner for a record of the proceedings, the complete record of the proceedings, or the parts thereof as are designated by the petitioner in the request, shall be prepared by the Office of Administrative Hearings or the agency and shall be delivered to petitioner, within 30 days after the request, which time shall be extended for good cause shown, upon the payment of the fee specified in Section 69950 for the transcript, the cost of preparation of other portions of the record and for certification thereof. Thereafter, the remaining balance of any costs or charges for the preparation of the record shall be assessed against the petitioner whenever the agency prevails on judicial review following trial of the cause. These costs or charges constitute a debt of the petitioner which is collectible by the agency in the same manner as in the case of an obligation under a contract, and no license shall be renewed or reinstated where the petitioner has failed to pay all of these costs or charges. The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by an administrative law judge, the final decision, a~~

~~transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case. Where petitioner, within 10 days after the last day on which reconsideration can be ordered, requests the agency to prepare all or any part of the record the time within which a petition may be filed shall be extended until 30 days after its delivery to him or her. The agency may file with the court the original of any document in the record in lieu of a copy thereof. In the event that the petitioner prevails in overturning the administrative decision following judicial review, the agency shall reimburse the petitioner for all costs of transcript preparation, compilation of the record, and certification.~~

Comment. The first sentence of former Section 11523 is continued in Code of Civil Procedure Sections 1120 (application of title) and 1121.110 (conflicting or inconsistent statute controls).

The second sentence is superseded by Code of Civil Procedure Section 1123.630 (time for filing petition for review of decision in adjudicative proceeding).

The third sentence is restated in Code of Civil Procedure Section 1123.320 (administrative review of final decision).

The first portion of the fourth sentence is continued in Code of Civil Procedure Section 1123.830 (preparation of record). The last portion of the fourth sentence is continued in substance in Code of Civil Procedure Section 1123.910 (fee for preparing record).

The fifth sentence is superseded by Code of Civil Procedure Section 1123.920 (recovery of costs of suit).

The first portion of the sixth sentence is omitted as unnecessary, since under Section 1123.920(b) the cost of the record is recoverable by the prevailing party, and under general rules of civil procedure costs of suit are included in the judgment. See Code Civ. Proc. § 1034(a); Cal. Ct. R. 870(b)(4). The last portion of the sixth sentence is continued in Code of Civil Procedure Section 1123.930.

The seventh sentence is superseded by Code of Civil Procedure Section 1123.820 (contents of administrative record).

The eighth sentence is superseded by Code of Civil Procedure Section 1123.630 (time for filing petition for review of decision in adjudicative proceeding).

The ninth sentence is continued in substance in Code of Civil Procedure Section 1123.710 (applicability of rules of practice for civil

actions) and Evidence Code Section 1511 (duplicate and original of a writing generally admissible to same extent).

The tenth sentence is continued in substance in Code of Civil Procedure Section 1123.920.

Gov't Code § 11524 (amended). Continuances

11524. (a) The agency may grant continuances. When an administrative law judge of the Office of Administrative Hearings has been assigned to the hearing, no continuance may be granted except by him or her or by the presiding judge of the appropriate regional office of the Office of Administrative Hearings, for good cause shown.

(b) When seeking a continuance, a party shall apply for the continuance within 10 working days following the time the party discovered or reasonably should have discovered the event or occurrence which establishes the good cause for the continuance. A continuance may be granted for good cause after the 10 working days have lapsed if the party seeking the continuance is not responsible for and has made a good faith effort to prevent the condition or event establishing the good cause.

~~(c) In the event that an application for a continuance by a party is denied by an administrative law judge of the Office of Administrative Hearings, and the party seeks judicial review thereof, the party shall, within 10 working days of the denial, make application for appropriate judicial relief in the superior court or be barred from judicial review thereof as a matter of jurisdiction. A party applying for judicial relief from the denial shall give notice to the agency and other parties. Notwithstanding Section 1010 of the Code of Civil Procedure, the notice may be either oral at the time of the denial of application for a continuance or written at the same time application is made in court for judicial relief. This subdivision does not apply to the Department of Alcoholic Beverage Control.~~

Comment. Section 11524 is amended to delete the provision for immediate review of denial of a continuance. Standard principles of finality and exhaustion of administrative remedies apply to this and other preliminary decisions in adjudicative proceeding. See, e.g., Code Civ. Proc. § 1123.310 (exhaustion required).

STATE PERSONNEL BOARD AND DEPARTMENT OF
PERSONNEL ADMINISTRATION

Gov't Code § 19576.1 (amended). Employee discipline in State Bargaining Unit 5

19576.1. (a) Effective January 1, 1996, notwithstanding Section 19576, this section shall apply only to state employees in State Bargaining Unit 5.

(b) Whenever an answer is filed by an employee who has been suspended without pay for five days or less or who has received a formal reprimand or up to a five percent reduction in pay for five months or less, the Department of Personnel Administration or its authorized representative shall make an investigation, with or without a hearing, as it deems necessary. However, if he or she receives one of the cited actions in more than three instances in any 12-month period, he or she, upon each additional action within the same 12-month period, shall be afforded a hearing before the State Personnel Board if he or she files an answer to the action.

(c) The Department of Personnel Administration shall not have the above authority with regard to formal reprimands. Formal reprimands shall not be appealable by the receiving employee by any means, except that the State Personnel Board, pursuant to its constitutional authority, shall maintain its right to review all formal reprimands. Formal reprimands shall remain available for use by the appointing authorities for the purpose of progressive discipline.

(d) Disciplinary action taken pursuant to this section is not subject to Sections 19180, 19574.1, 19574.2, 19575, 19575.5, 19579, 19580, 19581, 19581.5, 19582, 19583, and 19587, or

to State Personnel Board Rules 51.1 to 51.9, inclusive, 52, and 52.1 to 52.5, inclusive. *Disciplinary action taken pursuant to this section is not subject to judicial review.*

(e) Notwithstanding any law or rule, if the provisions of this section are in conflict with the provisions of the memorandum of understanding reached pursuant to Section 3517.5, the memorandum of understanding shall be controlling without further legislative action, except that if the provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

Comment. Section 19576.1 is amended to add the second sentence to subdivision (d). This continues the substance of former Code of Civil Procedure Section 1094.5(j).

LOCAL AGENCIES

Gov't Code § 54963 (added). Decision of local agency; judicial review

54963. (a) This section applies to a decision of a local agency as defined in Section 1121.250 of the Code of Civil Procedure, other than by a school district, suspending, demoting, or dismissing an officer or employee, revoking or denying an application for a permit, license, or other entitlement, or denying an application for any retirement benefit or allowance.

(b) If the decision is not announced at the close of the hearing, the date, time, and place of the announcement of the decision shall be announced at the hearing.

(c) Judicial review of the decision shall be under Title 2 (commencing with 1120) of Part 3 of the Code of Civil Procedure.

Comment. Subdivision (a) of Section 54963 continues subdivision (e) of former Code of Civil Procedure Section 1094.6. Subdivision (b) continues the third sentence of subdivision (b) of former Code of Civil Procedure Section 1094.6. Subdivision (c) is new.

Section 54963 applies to agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person. Code Civ. Proc. § 1121.250 (“decision” defined).

Gov’t Code § 65009 (amended). Actions challenging local government decisions

65009. (a)(1) The Legislature finds and declares that there currently is a housing crisis in California and it is essential to reduce delays and restraints upon expeditiously completing housing projects.

(2) The Legislature further finds and declares that a legal action challenging a decision of a city, county, or city and county has a chilling effect on the confidence with which property owners and local governments can proceed with projects. Legal actions filed to attack, review, set aside, void, or annul a decision of a city, county, or city and county pursuant to this division can prevent the completion of needed developments even though the projects have received required governmental approvals.

(3) The purpose of this section is to provide certainty for property owners and local governments regarding decisions made pursuant to this division.

(b)(1) In an action or proceeding to attack, review, set aside, void, or annul a finding, determination, or decision of a public agency made pursuant to this title at a properly noticed public hearing, the issues raised shall be limited to those raised in the public hearing or in written correspondence delivered to the public agency prior to, or at, the public hearing, except where the court finds either of the following:

(A) The issue could not have been raised at the public hearing by persons exercising reasonable diligence.

(B) The body conducting the public hearing prevented the issue from being raised at the public hearing.

(2) If a public agency desires the provisions of this subdivision to apply to a matter, it shall include in any public

notice issued pursuant to this title a notice substantially stating all of the following: “If you challenge the (nature of the proposed action) in court, you may be limited to raising only those issues you or someone else raised at the public hearing described in this notice, or in written correspondence delivered to the (public entity conducting the hearing) at, or prior to, the public hearing.”

(3) The application of this subdivision to causes of action brought pursuant to subdivision (d) applies only to the final action taken in response to the notice to the city or county clerk. If no final action is taken, then the issue raised in the cause of action brought pursuant to subdivision (d) shall be limited to those matters presented at a properly noticed public hearing or to those matters specified in the notice given to the city or county clerk pursuant to subdivision (d), or both.

(c) Except as provided in subdivisions (d) and (i), no action or proceeding shall be maintained in any of the following cases by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days after the legislative body’s decision:

(1) To attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a general or specific plan. This paragraph does not apply where an action is brought based upon the complete absence of a general plan or a mandatory element thereof, but does apply to an action attacking a general plan or mandatory element thereof on the basis that it is inadequate.

(2) To attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a zoning ordinance.

(3) To determine the reasonableness, legality, or validity of any decision to adopt or amend any regulation attached to a specific plan.

(4) To attack, review, set aside, void, or annul the decision of a legislative body to adopt, amend, or modify a

development agreement. An action or proceeding to attack, review, set aside, void, or annul the decisions of a legislative body to adopt, amend, or modify a development agreement shall only extend to the specific portion of the development agreement that is the subject of the adoption, amendment, or modification. This paragraph applies to development agreements, amendments, and modifications adopted on or after January 1, 1996.

(5) Concerning any of the proceedings, acts, or determinations taken, done, or made prior to any of the decisions listed in paragraphs (1), (2), (3), and (4).

(d) An action or proceeding shall be commenced and the legislative body served within one year after the accrual of the cause of action as provided in this subdivision, if the action or proceeding meets both of the following requirements:

(1) It is brought in support of the development of housing which meet the requirements for housing for persons and families with low or moderate incomes set forth in Section 65915.

(2) It is brought with respect to actions taken pursuant to Article 10.6 (commencing with Section 65580) of Chapter 3 of this division, pursuant to Section 65589.5, 65863.6, 65915, or 66474.2 or pursuant to Chapter 4.2 (commencing with Section 65913).

A cause of action brought pursuant to this subdivision shall not be maintained until 60 days have expired following notice to the city or county clerk by the party bringing the cause of action, or his or her representative, specifying the deficiencies of the general plan, specific plan, or zoning ordinance. A cause of action brought pursuant to this subdivision shall accrue 60 days after notice is filed or the legislative body takes a final action in response to the notice, whichever occurs first. A notice or cause of action brought by one party

pursuant to this subdivision shall not bar filing of a notice and initiation of a cause of action by any other party.

(e) Upon the expiration of the time limits provided for in this section, all persons are barred from any further action or proceeding.

(f) Notwithstanding Section 65700, this section shall apply to charter cities.

(g) Except as provided in ~~subdivision~~ *subdivisions* (d) and (j), this section shall not affect any law prescribing or authorizing a shorter period of limitation than that specified herein.

(h) Except as provided in paragraph (4) of subdivision (c), this section shall be applicable to those decisions of the legislative body of a city, county, or city and county made pursuant to this division on or after January 1, 1984.

(i) Where the action or proceeding challenges the adequacy of a housing element, the action or proceeding may be initiated up to 60 days following the date the Department of Housing and Community Development reports its findings concerning the housing element pursuant to subdivision (h) of Section 65585.

(j) *A challenge to action of a public agency under this section shall be brought under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure, except as follows:*

(1) This subdivision does not apply to judicial review of an ordinance of a local agency.

(2) Sections 1123.630 and 1123.640 of the Code of Civil Procedure do not apply to proceedings governed by this section.

Comment. Section 65009 is amended to add subdivision (j) to make clear that judicial review under this section shall be under the judicial review provisions of the Code of Civil Procedure. See Code Civ. Proc. §§ 1120-1123.950. Paragraph (1) of subdivision (j) is consistent with Code of Civil Procedure Section 1121(d). Under paragraph (2) of

subdivision (j), the time limits and notice provisions of Code of Civil Procedure Sections 1123.630 and 1123.640 do not apply to proceedings governed by this section.

ZONING ADMINISTRATION

Gov't Code § 65907 (amended). Time for attacking administrative determination

65907. (a) ~~Except as otherwise provided by ordinance, any action or proceeding to attack, review, set aside, void, or annul~~ *A proceeding for judicial review of any decision of matters listed in Sections 65901 and 65903, or concerning of any of the proceedings, acts, or determinations taken, done, or made prior to such the decision, or to determine the reasonableness, legality, or validity of any condition attached thereto, shall not be maintained by any person unless the action or proceeding is commenced within 90 days and the legislative body is served within 120 days after the date of the decision. Thereafter, shall be under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. After the time provided in Section 1123.640 of the Code of Civil Procedure has expired, all persons are barred from any such action or a proceeding for judicial review or any defense of invalidity or unreasonableness of that decision or of these proceedings, acts, or determinations. All actions *A proceeding for judicial review* brought pursuant to this section shall be given preference over all other civil matters before the court, except probate, eminent domain, and forcible entry and unlawful detainer proceedings.*

(b) Notwithstanding Section 65803, this section shall apply to charter cities.

(c) ~~The amendments to subdivision (a) shall apply to decisions made pursuant to this division on or after January 1, 1984.~~

Comment. Subdivision (a) of Section 65907 is amended to make proceedings to which it applies subject to the judicial review provisions in the Code of Civil Procedure. Subdivision (c) is deleted as no longer necessary.

PRIVATE HOSPITAL BOARDS

Health & Safety Code §§ 1339.62-1339.64 (added). Judicial review

Article 12. Judicial Review of Decision of Private Hospital Board

§ 1339.62. Definitions

1339.62. As used in this article:

(a) “Adjudicative proceeding” is defined in Section 1121.220 of the Code of Civil Procedure.

(b) “Decision” is defined in Section 1121.250 of the Code of Civil Procedure.

Comment. Section 1339.62 applies definitions applicable to the judicial review provisions in the Code of Civil Procedure.

§ 1339.63. Judicial review; venue

1339.63. (a) Judicial review of a decision of a private hospital board in an adjudicative proceeding shall be under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.

(b) The proper county for judicial review of a decision of a private hospital board in an adjudicative proceeding is determined under Title 4 (commencing with Section 392) of Part 2 of the Code of Civil Procedure.

Comment. Subdivision (a) of Section 1339.63 continues the effect of former Code of Civil Procedure Section 1094.5(d). See also *Anton v. San Antonio Community Hosp.*, 19 Cal. 3d 802, 815-20, 567 P.2d 1162, 140 Cal. Rptr. 442 (1979) (administrative mandamus available to review action by private hospital board).

Subdivision (b) continues the substance of existing law. See Code Civ. Proc. § 1109; California Administrative Mandamus § 8.16, at 269 (Cal.

Cont. Ed. Bar, 2d ed. 1989). See also Sections 1339.62 (“adjudicative proceeding” and “decision” defined); 1339.64 (standard of review of factfinding).

Judicial review of a decision of a public hospital is also under Code of Civil Procedure Sections 1120-1123.950. See Code Civ. Proc. §§ 1120 (title applies to judicial review of agency action), 1121.130 (“agency” broadly defined to include all governmental entities).

§ 1339.64. Standard of review of factfinding

1339.64. The standard for judicial review of whether a decision of a private hospital board in an adjudicative proceeding is based on an erroneous determination of fact made or implied by the board is whether the board’s determination is supported by substantial evidence in the light of the whole record.

Comment. Section 1339.64 continues former Code of Civil Procedure Section 1094.5(d), except that the independent judgment standard of review of alleged discriminatory action under Section 1316 is not continued.

AGRICULTURAL LABOR RELATIONS BOARD

Lab. Code § 1160.8 (amended). Review of final order of board; procedure

1160.8. Any person aggrieved by the final order of the board granting or denying in whole or in part the relief sought may obtain a review of *such the* order in the court of appeal having jurisdiction over the county wherein the unfair labor practice in question was alleged to have been engaged in, or wherein *such the* person resides or transacts business, by ~~filing in such court a written petition requesting that the order of the board be modified or set aside. Such petition shall be filed with the court within 30 days from the date of the issuance of the board’s order under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.~~ Upon the filing of *such the* petition *for review*, the court shall cause notice to be served upon the board and thereupon shall have

jurisdiction of the proceeding. The board shall file in the court the record of the proceeding, certified by the board within 10 days after the clerk's notice unless ~~such~~ *the* time is extended by the court for good cause shown. The court shall have jurisdiction to grant to the board ~~such~~ *any* temporary relief or restraining order it deems just and proper and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part, the order of the board. ~~The findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.~~

An order directing an election shall not be stayed pending review, but ~~such~~ *the* order may be reviewed as provided in Section 1158.

If the time for review of the board order has lapsed, and the person has not voluntarily complied with the board's order, the board may apply to the superior court in any county in which the unfair labor practice occurred or wherein ~~such~~ *the* person resides or transacts business for enforcement of its order. If after hearing, the court determines that the order was issued pursuant to procedures established by the board and that the person refuses to comply with the order, the court shall enforce ~~such~~ *the* order by writ of injunction or other proper process. The court shall not review the merits of the order.

Comment. Section 1160.8 is amended to make proceedings to which it applies subject to the judicial review provisions in the Code of Civil Procedure.

The former second sentence of Section 1160.8 which required the petition to be filed within 30 days from the date of issuance of the board's order is superseded by Code of Civil Procedure Section 1123.630. Under that section, the petition for review must be filed not later than 30 days after the decision is effective. A decision is effective 30 days after it is delivered or mailed to the respondent, unless the

agency orders that it shall become effective sooner. Code Civ. Proc. § 1123.630(b)(2).

WORKERS' COMPENSATION APPEALS BOARD

Lab. Code § 5950 (amended). Judicial review

5950. Any person affected by an order, decision, or award of the appeals board may, ~~within the time limit specified in this section, apply to~~ *petition* the Supreme Court or to the court of appeal for the appellate district in which he ~~the~~ *person* resides, for a writ of *judicial* review, for the purpose of inquiring into and determining the lawfulness of the original order, decision, or award or of the order, decision, or award following reconsideration. ~~The application for writ of review must be made within 45 days after a petition for reconsideration is denied, or, if a petition is granted or reconsideration is had on the appeal board's own motion, within 45 days after the filing of the order, decision, or award following reconsideration.~~

Comment. Section 5950 is amended to delete the second sentence specifying the time limit for judicial review. Under Code of Civil Procedure Section 1123.630, the petition for review must be filed not later than 30 days after the decision is effective. A decision is effective 30 days after it is delivered or mailed to the respondent, unless the agency orders that it shall become effective sooner. Code Civ. Proc. § 1123.630(b)(2).

Lab. Code § 5951 (repealed). Writ of review

~~5951. The writ of review shall be made returnable at a time and place then or thereafter specified by court order and shall direct the appeals board to certify its record in the case to the court within the time therein specified. No new or additional evidence shall be introduced in such court, but the cause shall be heard on the record of the appeals board as certified to by it.~~

Comment. Section 5951 is repealed because it is superseded by the judicial review provisions of the Code of Civil Procedure. See Section 5954. The provision in the first sentence for the return of the writ of review is superseded by Code of Civil Procedure Section 1123.710 (applicability of rules of practice for civil actions). The provision in the first sentence for the record of the department is superseded by Code of Civil Procedure Section 1123.820 (contents of administrative record). The second sentence is superseded by Code of Civil Procedure Sections 1123.810 (administrative record exclusive basis for judicial review) and 1123.850 (new evidence on judicial review).

Lab. Code § 5952 (repealed). Scope of review

~~5952. The review by the court shall not be extended further than to determine, based upon the entire record which shall be certified by the appeals board, whether:~~

~~(a) The appeals board acted without or in excess of its powers.~~

~~(b) The order, decision, or award was procured by fraud.~~

~~(c) The order, decision, or award was unreasonable.~~

~~(d) The order, decision, or award was not supported by substantial evidence.~~

~~(e) If findings of fact are made, such findings of fact support the order, decision, or award under review.~~

~~Nothing in this section shall permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence.~~

Comment. Subdivisions (a) through (e) of former Section 5952 are superseded by Code of Civil Procedure Sections 1123.410-1123.460. See also Code Civ. Proc. § 1123.160 (condition of relief).

The last sentence is superseded by Code of Civil Procedure Sections 1123.430 (review of factfinding), 1123.810 (administrative record exclusive basis for review), and 1123.850 (new evidence). Nothing in the Code of Civil Procedure or in this article permits the court to hold a trial de novo.

Lab. Code § 5953 (amended). Right to appear in judicial review proceeding

~~5953. The findings and conclusions of the appeals board on questions of fact are conclusive and final and are not subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the appeals board. The parties to a judicial review proceeding are the appeals board and each party to the action or proceeding before the appeals board shall have the right to appear in the review proceeding. Upon the hearing, the court shall enter judgment either affirming or annulling the order, decision, or award, or the court may remand the case for further proceedings before the appeals board whose interest is adverse to the petitioner for judicial review.~~

Comment. Section 5953 is largely superseded by the judicial review provisions of the Code of Civil Procedure. See Section 5954. The first sentence is superseded by Code of Civil Procedure Section 1123.430 (review of factfinding). The second sentence is superseded by Code of Civil Procedure Section 1123.420 (review of interpretation of law). The fourth sentence is superseded by Code of Civil Procedure Section 1123.730 (type of relief).

Lab. Code § 5954 (amended). Judicial review

~~5954. The provisions of the Code of Civil Procedure relating to writs of review shall, so far as applicable, apply to proceedings in the courts under the provisions of this article. A copy of every pleading filed pursuant to the terms of this article shall be served on the appeals board and upon every party who entered an appearance in the action before the appeals board and whose interest therein is adverse to the party filing such pleading. Judicial review shall be under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.~~

Comment. Section 5954 is amended to replace the former provisions with a reference to the judicial review provisions of the Code of Civil Procedure. Special provisions of this article prevail over general provisions of the Code of Civil Procedure governing judicial review. See

Code Civ. Proc. § 1121.110 (conflicting or inconsistent statute controls). Copies of pleadings in judicial review proceedings must be served on the parties. See Code Civ. Proc. §§ 1123.610 (petition for review), 1123.710 (applicability of rules of practice for civil actions).

Lab. Code § 5955 (amended). Courts having jurisdiction; mandate

5955. No court of this state, except the Supreme Court and the courts of appeal to the extent herein specified, has jurisdiction to review, reverse, correct, or annul any order, rule, decision, or award of the appeals board, or to suspend or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the appeals board in the performance of its duties ~~but a writ of mandate shall lie from the Supreme Court or a court of appeal in all proper cases.~~

Comment. Section 5955 is amended to delete the former reference to a writ of mandate. The writ of mandate has been replaced by a petition for review. See Section 5954; Code Civ. Proc. § 1123.610 (petition for review). See also Code Civ. Proc. § 1123.510(b) (original writ jurisdiction of Supreme Court and courts of appeal not affected).

Lab. Code § 5956 (repealed). Stay of order

5956. ~~The filing of a petition for, or the pendency of, a writ of review shall not of itself stay or suspend the operation of any order, rule, decision, or award of the appeals board, but the court before which the petition is filed may stay or suspend, in whole or in part, the operation of the order, decision, or award of the appeals board subject to review, upon the terms and conditions which it by order directs, except as provided in Article 3 of this chapter.~~

Comment. Former Section 5956 is superseded by Code of Civil Procedure Section 1123.720 (stays). The stay provisions of the Code of Civil Procedure are subject to Article 3 (commencing with Section 6000) (undertaking on stay order). See Code Civ. Proc. § 1121.110 (conflicting or inconsistent statute prevails).

Lab. Code § 6000 (amended). Undertaking on stay order

6000. The operation of any order, decision, or award of the appeals board under the provisions of this division or any judgment entered thereon, shall not at any time be stayed by the court to which petition is made for a writ of *judicial* review, unless an undertaking is executed on the part of the petitioner.

Comment. Section 6000 is amended reflect replacement of the writ of review by the judicial review procedure in Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. The stay provisions of Code of Civil Procedure Section 1123.720 are subject to this article. See Code Civ. Proc. § 1121.110 (conflicting or inconsistent statute prevails).

CALIFORNIA ENVIRONMENTAL QUALITY ACT

Pub. Res. Code § 21168 (amended). Conduct of proceeding

21168. *Any (a) Except as provided in subdivision (b), an action or proceeding to attack, review, set aside, void or annul a determination, finding, or decision of a public agency, made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency, on the grounds of noncompliance with the provisions of this division shall be in accordance with the provisions of Section 1094.5 under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.*

In any such *action proceeding*, the court shall not exercise its independent judgment on the evidence, but shall only determine *only* whether the act or decision is supported by substantial evidence in the light of the whole record.

(b) Sections 1123.630 and 1123.640 of the Code of Civil Procedure do not apply to judicial review of proceedings under this division.

Comment. Section 21168 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

The former reference to “a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency” is deleted so that Section 21168 will apply both to proceedings formerly reviewed by administrative mandamus and to those formerly reviewed by traditional mandamus.

Pub. Res. Code § 21168.5 (repealed). Inquiry limited to prejudicial abuse of discretion

~~21168.5. In any action or proceeding, other than an action or proceeding under Section 21168, to attack, review, set aside, void or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with this division, the inquiry shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.~~

Comment. Section 21168.5, which applied to traditional mandamus, is superseded by Section 21168. Under Section 21168, both administrative and traditional mandamus under prior law are replaced by the new judicial review statute. See Code Civ. Proc. §§ 1120-1123.950. The provision of former Section 21168.5 limiting the inquiry to prejudicial abuse of discretion is superseded by Code of Civil Procedure Sections 1123.420-1123.460 (standards of review). Discretionary action is now reviewed using the standard of Code of Civil Procedure Section 1123.450 (abuse of discretion).

STATE ENERGY RESOURCES CONSERVATION AND
DEVELOPMENT COMMISSION

Pub. Res. Code § 25531.5 (added). Inapplicability of Code of Civil Procedure

25531.5. Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure does not apply to judicial review of a decision of the commission on an application of an electric utility for certification of a site and related facility under this code.

Comment. Section 25531.5 makes clear the judicial review provisions of the Code of Civil Procedure do not apply to power plant siting decisions of the Energy Commission under this code.

PUBLIC UTILITIES COMMISSION

Pub. Util. Code § 1768 (added). Inapplicability of Code of Civil Procedure

1768. Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure does not apply to judicial review of proceedings of the commission under this code.

Comment. Section 1768 makes clear the judicial review provisions of the Code of Civil Procedure do not apply to proceedings of the Public Utilities Commission under this code.

PROPERTY TAXATION

Rev. & Tax. Code § 2954 (amended). Assessee's challenge by writ

2954. (a) An assessee may challenge a seizure of property made pursuant to Section 2953 by petitioning for a writ of prohibition or writ of mandate in the superior court *review under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure* alleging:

- (1) That there are no grounds for the seizure;
- (2) That the declaration of the tax collector is untrue or inaccurate; and
- (3) That there are and will be sufficient funds to pay the taxes prior to the date such taxes become delinquent.

(b) As a condition of maintaining the *special review* proceedings for a writ, the assessee shall file with the tax collector a bond sufficient to pay the taxes and all fees and charges actually incurred by the tax collector as a result of the seizure, and shall furnish proof of the bond with the court. Upon the filing of the bond, the tax collector shall release the property to the assessee.

Comment. Section 2954 is amended to make judicial review under the section subject to general provisions in the Code of Civil Procedure for review of agency action.

Rev. & Tax. Code § 2955 (technical amendment). Recovery of costs by assessee

2955. If the assessee prevails in the *special review* proceeding ~~for a writ~~ under Section 2954, the assessee is entitled to recover from the county all costs, including attorney's fees, incurred by virtue of the seizure and subsequent actions, and the tax collector shall bear the costs of seizure and any fees and expenses of keeping the seized property. If, however, subsequent to the date the taxes in question become delinquent, the taxes are not paid in full and it becomes necessary for the tax collector to seize property of the assessee in payment of the taxes or to commence an action against the assessee for recovery of the taxes, in addition to all taxes and delinquent penalties, the assessee shall reimburse the county for all costs incurred at the time of the original seizure and all other costs charged to the tax collector or the county as a result of the original seizure and any subsequent actions.

Comment. Section 2955 is amended to recognize that judicial review under Section 2954 is subject to general provisions in the Code of Civil Procedure for review of agency action.

Rev. & Tax. Code § 2956 (technical amendment). Precedence for court hearing

2956. In all *special review* proceedings ~~for a writ~~ brought under this article, all courts in which such proceedings are pending shall, upon the request of any party thereto, give such proceedings precedence over all other civil actions and proceedings, except actions and proceedings to which special precedence is otherwise given by law, in the matter of the setting of them for hearing or trial and in their hearing or trial,

to the end that all such proceedings shall be quickly heard and determined.

Comment. Section 2956 is amended to recognize that judicial review under this article is subject to general provisions in the Code of Civil Procedure for review of agency action.

STATE BOARD OF EQUALIZATION

Rev. & Tax. Code § 7279.6 (amended). Judicial review

7279.6. An arbitrary and capricious action of the board in implementing the provisions of this chapter shall be reviewable ~~by writ~~ *under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.*

Comment. Section 7279.6 is amended to make judicial review under the section subject to general provisions in the Code of Civil Procedure for review of agency action.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

Unemp. Ins. Code § 1243 (amended). Judicial review

1243. A decision of the appeals board on an appeal from a denial of a protest under Section 1034 or on an appeal from a denial or granting of an application for transfer of reserve account under Article 5 (commencing with Section 1051) shall be subject to judicial review ~~if an appropriate proceeding is filed by the employer within 90 days of the service of notice of the decision~~ *under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.* The director may, in writing, extend for a period of not exceeding two years the time *provided in Section 1123.630 of the Code of Civil Procedure* within which such proceeding may be instituted if written request for such extension is filed with the director within the ~~90-day period~~ *time prescribed by that section.*

Comment. Section 1243 is amended to make clear that judicial review under the section shall be under Code of Civil Procedure Sections 1120-1123.950. The former 90-day time limit for a proceeding under this section is superseded by the time limit provided in Code of Civil Procedure Section 1123.630 (30 days from effective date of decision or giving of notice, whichever is later).

DEPARTMENT OF MOTOR VEHICLES

Veh. Code § 13559 (amended). Petition for review

13559. (a) Notwithstanding Section 14400 or 14401, ~~within 30 days of the issuance of the~~ *a person who has been issued a* notice of determination of the department sustaining an order of suspension or revocation of the person's privilege to operate a motor vehicle, after the hearing pursuant to Section 13558, ~~the person may file a petition for review of the order in the court of competent jurisdiction in the person's county of residence. The filing of a petition for judicial review shall not stay the order of suspension or revocation. The review shall be on the record of the hearing and the court shall not consider other evidence. If the court finds that the department exceeded its constitutional or statutory authority, made an erroneous interpretation of the law, acted in an arbitrary and capricious manner, or made a determination which is not supported by the evidence in the record,~~ *Except as provided in this section, the proceedings shall be conducted under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. In addition to the relief authorized under Title 2,* the court may order the department to rescind the order of suspension or revocation and return, or reissue a new license to, the person.

(b) A finding by the court after a review pursuant to this section shall have no collateral estoppel effect on a subsequent criminal prosecution and does not preclude relitigation of those same facts in the criminal proceeding.

Comment. Section 13559 is amended to make judicial review proceedings under the section subject to the judicial review provisions of the Code of Civil Procedure. The special venue rule of Section 13559 is preserved.

Veh. Code § 14401 (amended). Statute of limitations on review

14401. (a) Any action brought in a court of competent jurisdiction to review any order of the department refusing, canceling, placing on probation, suspending, or revoking the privilege of a person to operate a motor vehicle shall be commenced within 90 days from the date the order is noticed.

(b) Upon final completion of all administrative appeals, the person whose driving privilege was refused, canceled, placed on probation, suspended, or revoked shall be given written notice by the department of his or her right to a review by a court pursuant to subdivision (a) under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.

Comment. Subdivision (b) of Section 14401 is amended to recognize that judicial review is under Code of Civil Procedure Sections 1120-1123.950. See Code Civ. Proc. § 1121.120 (other forms of judicial review replaced).

DEPARTMENT OF SOCIAL SERVICES

Welf. & Inst. Code § 10962 (amended). Judicial review

10962. The applicant or recipient or the affected county, within one year after receiving notice of the director's final decision, may file a petition with the superior court, for judicial review under the provisions of Section 1094.5 Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure, praying for a review of the entire proceedings in the matter, upon questions of law involved in the case. Such *The* review, if granted, shall be the exclusive remedy available to the applicant or recipient or county for review of the director's decision. The director shall be the sole respondent in such *the* proceedings. Immediately upon

being served the director shall serve a copy of the petition on the other party entitled to judicial review and ~~such~~ *that* party shall have the right to intervene in the proceedings.

No filing fee shall be required for the filing of a petition *for review* pursuant to this section. ~~Any such petition to the superior court~~ *The proceeding for judicial review* shall be entitled to a preference in setting a date for hearing ~~on the petition~~. No bond shall be required in the case of any petition for review, nor in any appeal ~~therefrom~~ *from the decision of the superior court*. The applicant or recipient shall be entitled to reasonable attorney's fees and costs, if ~~he obtains a decision in his favor~~ *the applicant or recipient obtains a favorable decision*.

Comment. Section 10962 is amended to make judicial review of a welfare decision of the Department of Social Services subject to the judicial review provisions in the Code of Civil Procedure. Judicial review is in the superior court. Code Civ. Proc. § 1123.510. The scope of review is prescribed in Code of Civil Procedure Sections 1123.410-1123.460. See also Code Civ. Proc. § 1123.160 (condition of relief).

Special provisions of this section prevail over general provisions of the Code of Civil Procedure governing judicial review. See Code Civ. Proc. § 1121.110 (conflicting or inconsistent statute controls).

UNCODIFIED

Uncodified (added). Severability

SEC. _____. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

Uncodified (added). Application of new law

SEC. _____. (a) This title applies to a proceeding commenced on or after January 1, 1998, for judicial review of agency action.

(b) The applicable law in effect before January 1, 1998, continues to apply to a proceeding for judicial review of agency action pending on January 1, 1998.

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COMMENTS TO TECHNICAL CONFORMING REVISIONS

Note. Senate Bill 261 makes revisions in existing codes to conform them to the new provisions in the Code of Civil Procedure for judicial review of agency action. To save printing costs, the text of Senate Bill 261 is not set out in this Appendix. Instead, Comments to sections in the bill are set out below. Leadlines for uncodified acts use the same numbering system as West's Annotated California Codes.

Department of Consumer Affairs

Bus. & Prof. Code § 125.7 (amended). Restraining orders

Comment. Section 125.7 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Bus. & Prof. Code § 125.8 (amended). Temporary order restraining licensee

Comment. Section 125.8 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Denial, Suspension, and Revocation of Licenses Generally

Bus. & Prof. Code § 494 (amended). Interim suspension or restriction order

Comment. Section 494 is amended to revise references to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Healing Arts Generally

Bus. & Prof. Code § 809.8 (amended). Judicial review, discovery, and testimony

Comment. Section 809.8 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Medical Board of California

Bus. & Prof. Code § 2087 (amended). Action to compel approval or admission

Comment. Section 2087 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former language prohibiting the court from exercising independent judgment on the evidence is deleted as unnecessary, since under Code of Civil Procedure Section 1123.430 the standard of review of factfinding is substantial evidence in light of the whole record.

Bus. & Prof. Code § 2337 (amended). Calendar preference

Comment. Section 2337 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Board of Pharmacy

Bus. & Prof. Code § 4300 (amended). Suspension or revocation of license; judicial review

Comment. Section 4300 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Board of Examiners in Veterinary Medicine

Bus. & Prof. Code § 4875.6 (amended). Procedure to contest citation or penalty

Comment. Section 4875.6 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Contractors' State License Board

Bus. & Prof. Code § 7071.11 (amended). Action on bond

Comment. Section 7071.11 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Bureau of Security and Investigative Services

Bus. & Prof. Code § 7502.4 (amended). Restraining order

Comment. Section 7502.4 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Structural Pest Control Board

Bus. & Prof. Code § 8662 (amended). Appeal of fine or suspension; judicial review

Comment. Section 8662 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Bus. & Prof. Code § 8698.3 (amended). (Operative until January 1, 1997) Civil penalties; judicial review

Comment. Section 8698.3 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former 30-day time limit of Section 8698.3 is superseded by Code of Civil Procedure Section 1123.640.

Real Estate Commissioner

Bus. & Prof. Code § 10471.5 (technical amendment). Notice of commissioner's decision

Comment. Section 10471.5 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former requirement of notice of the time to file a petition for review is superseded by Code of Civil Procedure Section 1123.630.

Department of Food and Agriculture (part 1)

Bus. & Prof. Code § 12015.3 (amended). (Operation contingent) Civil penalty

Comment. Section 12015.3 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in subdivision (c)(9) prescribing the time limit for a petition is superseded by Code of Civil Procedure Section 1123.640.

Attorney General (part 1)

Bus. & Prof. Code § 17550.18 (amended). (Operative until January 1, 1999) Severability; burden of proof; proceeding challenging decision of Attorney General

Comment. Section 17550.18 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former reference to substantial evidence review is continued in substance in Code of Civil Procedure Section 1123.430 (standard of review of factfinding). See also Code Civ. Proc. § 1123.450 (review of

agency exercise of discretion). The former provision on the record for review is superseded by Code of Civil Procedure Section 1123.820 (contents of administrative record) and 1123.850 (new evidence on judicial review).

California Horse Racing Board

Bus. & Prof. Code § 19463 (amended). Finality of action

Comment. Section 19463 is amended to make clear that judicial review of board action is under the judicial review provisions of the Code of Civil Procedure. The former last sentence of Section 19463 (30-day limitation period) is superseded by Code of Civil Procedure Section 1123.630 (limitation period for adjudicative proceeding). For administrative action other than in an adjudicative proceeding, the general limitations periods for ordinary civil actions will apply, as determined by the nature of the right asserted. See, e.g., *Allen v. Humboldt County Board of Supervisors*, 220 Cal. App. 2d 877, 884-85, 34 Cal. Rptr. 232, 236 (1963); see also *Berkeley Unified School Dist. v. State*, 33 Cal. App. 4th 350, 362-63, 365, 39 Cal. Rptr. 2d 326, 333, 335 (1995).

Attorney General (part 2)

Bus. & Prof. Code § 19813 (amended). Conduct of proceedings

Comment. Section 19813 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Civ. Code § 1812.203 (amended). Filing and updating disclosure statements

Comment. Section 1812.203 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former reference to superior court is superseded by Code of Civil Procedure Section 1123.510 (superior court jurisdiction). The former reference to “other judicial relief” is deleted, since the judicial review provisions of the Code of Civil Procedure provide the exclusive means of judicial review. See Code Civ. Proc. § 1121.120.

State Board of Equalization & Franchise Tax Board

Code Civ. Proc. § 706.075 (amended). Withholding order for taxes

Comment. Section 706.075 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

State Regulatory Agencies

Code Civ. Proc. § 1028.5 (technical amendment). Action between small business and regulatory agency

Comment. Section 1028.5 is amended to revise the reference to former Section 800 of the Government Code, which has been recodified in the Code of Civil Procedure.

General Law

Code Civ. Proc. § 1089.5 (amended). Answer to petition for writ of mandate

Comment. Section 1089.5 is amended to delete the reference to Section 11523 of the Government Code, which has been repealed. For formal adjudication under the Administrative Procedure Act, the record is requested pursuant to Section 1123.830, but Section 1089.5 does not apply to judicial review proceedings under Sections 1120-1123.950. See Section 1123.710 (Part 2 applies, but not Part 3).

Public Entities (part 1)

Code Civ. Proc. § 1245.255 (amended). Judicial review; resolution of necessity

Comment. Section 1245.255 is amended to change the former reference to a writ of mandate to a reference to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950.

School District Governing Boards

Educ. Code § 35145 (amended). Public meetings

Comment. Section 35145 is amended to delete the reference to mandamus or injunction. See Gov't Code § 54960.1 (petition for review).

Community College District Governing Boards

Educ. Code § 72121 (amended). Public meetings

Comment. Section 72121 is amended to delete the reference to mandamus or injunction. See Gov't Code § 54960.1 (petition for review).

Educ. Code § 81960 (amended). Proceeding to compel performance of duties

Comment. Section 81960 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Educ. Code § 87611 (amended). Judicial review

Comment. Section 87611 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Trustees of California State University**Educ. Code § 90072 (amended). Judicial review**

Comment. Section 90072 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Regents of the University of California**Educ. Code § 92491 (amended). Bondholder's power to secure performance**

Comment. Section 92491 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

California Educational Facilities Authority**Educ. Code § 94148 (amended). Restrictions**

Comment. Section 94148 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Council for Private Postsecondary and Vocational Education**Educ. Code § 94323 (amended). Procedure for notice and hearing**

Comment. Subdivision (k)(1) of Section 94323 is amended to replace the former reference to a writ of mandate with a reference to the

provisions for judicial review of Code of Civil Procedure Sections 1120-1123.950.

Former subdivision (k)(2) is deleted. The first sentence of former subdivision (k)(2) is superseded by Code of Civil Procedure Section 1123.820 (contents of administrative record). The second sentence of former subdivision (k)(2) is superseded by Code of Civil Procedure Section 1123.470 (burden of demonstrating invalidity of agency action on party asserting it). The third sentence of former subdivision (k)(2) is superseded by Code of Civil Procedure Section 1123.810 (record exclusive basis for judicial review). The fourth sentence of former subdivision (k)(2) is superseded by Code of Civil Procedure Sections 1123.420-1123.460.

Former subdivision (k)(3) is redesignated as subdivision (k)(2) and amended to delete the requirement that the party seeking a stay must establish a substantial likelihood that it will prevail on the merits. This is superseded by Code of Civil Procedure Section 1123.720(b) (petitioner likely to prevail on the merits, without a stay petitioner will suffer irreparable injury, and stay will not substantially harm others or threaten public health, safety, or welfare).

County Elections Officials

Elec. Code § 9190 (amended). Public examination; amendment or deletion of materials

Comment. Section 9190 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Elec. Code § 9295 (amended). Public examination

Comment. Section 9295 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Elec. Code § 13313 (amended). Public examination

Comment. Section 13313 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Savings and Loan Commissioner

Fin. Code § 8055 (amended). Judicial review

Comment. Section 8055 is amended to refer to the provisions for judicial review, see Code Civ. Proc. §§ 1120-1123.950, and to delete the former second sentence. The former second sentence is superseded by Code of Civil Procedure Section 1123.630. Under Section 1123.630, the time for filing a petition for review is 30 days after the decision is effective.

Fish and Game Commission

Fish & Game Code § 2076 (amended). Judicial review

Comment. Section 2076 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Department of Food and Agriculture (part 2)

Food & Agric. Code § 5311 (amended). Civil penalty

Comment. Section 5311 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former reference in subdivision (c) to the time within which review must be commenced is superseded by Code of Civil Procedure Section 1123.630.

State Agencies Responsible for Roadside Vegetation Control

Food & Agric. Code § 5509 (amended). Judicial review

Comment. Section 5509 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610. The former second sentence of Section 5509 authorizing injunctive relief is continued in substance in Code of Civil Procedure Section 1123.730 (relief permitted).

Department of Food and Agriculture (part 3)

Food & Agric. Code § 11512.5 (amended). Suspension; appeal

Comment. Section 11512.5 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

The former provision in subdivision (a)(5) prescribing the time limit for review is superseded by Code of Civil Procedure Section 1123.630.

Food & Agric. Code § 12648 (amended). Declaration of crop as nuisance; judicial review

Comment. Section 12648 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Food & Agric. Code § 12999.4 (amended). Civil penalty

Comment. Section 12999.4 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision requiring review to be sought within 30 days after the date of the decision is superseded by Code of Civil Procedure Section 1123.630.

Food & Agric. Code § 12999.5 (amended). Civil penalty

Comment. Section 12999.5 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in subdivision (c)(9) prescribing the time limit for review is superseded by Code of Civil Procedure Section 1123.630.

Food & Agric. Code § 14009 (amended). Review of action involving permit; judicial review

Comment. Section 14009 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Food & Agric. Code § 15071.5 (amended). Civil penalty

Comment. Section 15071.5 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Food & Agric. Code § 18931 (amended). Administrative and judicial review

Comment. Section 18931 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Food & Agric. Code § 19447 (amended). Civil penalty

Comment. Section 19447 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Food & Agric. Code § 21051.3 (amended). Civil penalty

Comment. Section 21051.3 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

The former provision in subdivision (c) prescribing the time limit for review is superseded by Code of Civil Procedure Section 1123.630.

Food & Agric. Code § 21051.4 (amended). Civil penalty

Comment. Section 21051.4 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Food & Agric. Code § 24007 (amended). Civil penalty; judicial review

Comment. Section 24007 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in subdivision (f) prescribing the time limit for review is superseded by Code of Civil Procedure Section 1123.630.

Food & Agric. Code § 35928 (amended). Prohibited use of raw milk; judicial review

Comment. Subdivision (d) of Section 35928 is amended to replace the former reference to Section 1085 of the Code of Civil Procedure with a reference to Code of Civil Procedure Sections 1120-1123.950, and to delete the former reference to the superior court. Under Section 1123.510 of the Code of Civil Procedure, the superior court is the proper court for judicial review.

Food & Agric. Code § 43003 (amended). Civil penalty; judicial review

Comment. Section 43003 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Food & Agric. Code § 46007 (amended). Civil penalty; judicial review

Comment. Section 46007 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in subdivision (e) prescribing the time limit for review is superseded by Code of Civil Procedure Section 1123.630. The former provision in subdivision (e) for review to be sought by “any person” is superseded by Code of Civil Procedure Sections 1123.210-1123.240 (standing). This may not be a significant substantive change, because “any person” may have been qualified by the provision in Code of Civil Procedure Section 1086 permitting mandamus to be sought by a party “beneficially interested.”

Food & Agric. Code § 47025 (amended). (Operative until January 1, 2000) Violations and enforcement; judicial review

Comment. Section 47025 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The provision formerly in subdivision (d)(9) prescribing the time within which judicial review must be sought is superseded by Code of Civil Procedure Section 1123.630.

Food & Agric. Code § 59234.5 (amended). Deficiency determination

Comment. Subdivision (d) of Section 59234.5 is amended to refer to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Food & Agric. Code § 60016 (amended). Deficiency judgment

Comment. Subdivision (d) of Section 60016 is amended to refer to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Food & Agric. Code § 61899 (amended). Judicial review

Comment. Section 61899 is amended to refer to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Food & Agric. Code § 62665 (amended). Judicial review

Comment. Section 62665 is amended to refer to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former 30-day time limit for review is superseded by Code of Civil Procedure Section 1123.630.

Public Entities (part 2)

Gov't Code § 942 (amended). Judicial review

Comment. Section 942 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to compel performance of a ministerial duty of a public entity. See Code Civ. Proc. §§ 1121.120, 1123.610. However, an action against the public entity under the California Tort Claims Act is not subject to the judicial review provisions of the Code of Civil Procedure. See *id.* § 1121(a)(3) and Comment.

Local Public Entities

Gov't Code § 970.2 (amended). Duty of public entity to pay judgment; judicial review

Comment. Section 970.2 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to compel performance of a ministerial duty of a public entity. See Code Civ. Proc. §§ 1121.120, 1123.610. However, an action against the public entity under the California Tort Claims Act is not subject to the judicial review provisions of the Code of Civil Procedure. See *id.* § 1121(a)(3) and Comment.

Gov't Code § 7911 (amended). Return of excess revenues; judicial review

Comment. Section 7911 is amended to replace the former reference to a writ of mandate with a reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.850.

Administrator for Oil Spill Response, Department of Fish & Game

Gov't Code § 8670.68 (amended). Complaint; hearing; judicial review

Comment. Section 8670.68 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in subdivision (d) for review jurisdiction in the court of appeal is superseded by Code of Civil Procedure Section 1123.510 (superior court jurisdiction). The former fourth sentence of subdivision (d) (substantial evidence review) is superseded by Code of Civil Procedure Sections 1123.420 (independent judgment review of application of law to fact) and 1123.430 (substantial evidence review of factfinding). The former fifth sentence of subdivision (d) (petition for mandate does not stay corrective action or penalties) is superseded by Code of Civil Procedure Section 1123.720 (stay in discretion of reviewing court).

Gov't Code § 8670.69.6 (amended). Judicial review of cease and desist order

Comment. Section 8670.69.6 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former reference to the superior court is continued in substance in

Code of Civil Procedure Section 1123.510 (jurisdiction in superior court).

State Agencies

Gov't Code § 11130 (amended). Commencement of action

Comment. Section 11130 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Gov't Code § 11130.3 (amended). Voiding action in violation of open meeting law

Comment. Section 11130.3 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610. The former provision in subdivision (a) prescribing the time limit for review is superseded by Code of Civil Procedure Section 1123.630.

Administrative Procedure Act (rulemaking)

Gov't Code § 11350.3 (amended). Judicial review of disapproved or repealed regulation

Comment. Section 11350.3 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610. The former reference to superior court is continued in substance in Code of Civil Procedure Section 1123.510.

Administrative Procedure Act (administrative adjudication)

Gov't Code § 11460.80 (amended). (Operative July 1, 1997) Judicial review

Comment. Section 11460.80 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Gov't Code § 11517 (amended). Decision in contested case

Comment. Section 11517 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Gov't Code § 11529 (amended). Interim orders

Comment. Section 11529 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

State Fair Employment and Housing Commission**Gov't Code § 12987.1 (amended). Judicial review**

Comment. Section 12987.1 is amended to revise the references to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The language added to the last portion of subdivision (a) continues the substance of the former language it replaces. The language formerly found in subdivision (b) concerning permissible relief is continued in substance in Code of Civil Procedure Sections 1123.720 (stay of agency action) and 1123.730 (court may set aside or modify agency action and make interlocutory orders).

State Board of Control**Gov't Code § 13969.1 (amended). Decision; review**

Comment. Section 13969.1 is amended to replace the former references to a writ of mandate with a reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.850.

California Health Facilities Financing Authority**Gov't Code § 15444 (amended). Rights and remedies of bond holders**

Comment. Section 15444 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to compel performance of a ministerial duty by a public entity. See Code Civ. Proc. §§ 1121.120, 1123.610.

Commission on State Mandates**Gov't Code § 17559 (amended). Judicial review**

Comment. Section 17559 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Board of Administration, Public
Employees Retirement System

Gov't Code § 20126 (technical amendment). Refusal to admit liability

Comment. Section 20126 is amended to revise the reference to former Section 800.

County Boards of Supervisors (part 1)

Gov't Code § 26370 (amended). Rights and remedies of bond holders

Comment. Section 26370 is amended to replace the former reference to mandamus or other appropriate proceeding with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Gov't Code § 26470 (amended). Rights and remedies of bond holders

Comment. Section 26470 is amended to replace the former reference to mandamus or other appropriate proceeding with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

County Boards of Retirement

Gov't Code § 31725 (amended). Determination of permanent incapacity

Comment. Section 31725 is amended to replace the former reference to the writ of mandamus with a reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.850.

Local Agencies (part 1)

Gov't Code § 50770 (amended). Rights and remedies of bond holders

Comment. Section 50770 is amended to replace the former reference to mandamus or other appropriate proceeding with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Governing Boards of Cities and Counties

Gov't Code § 51154 (amended). Judicial review

Comment. Section 51154 is amended to add subdivision (b). The judicial review provisions of the Code of Civil Procedure have replaced mandamus as the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

County Boards of Supervisors (part 2) or City Council

Gov't Code § 51286 (amended). Judicial review

Comment. Section 51286 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Gov't Code § 51294 (amended). Enforcement

Comment. Section 51294 is amended to add subdivision (b). The judicial review provisions of the Code of Civil Procedure have replaced mandamus as the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Gov't Code § 51294.2 (amended). Validation proceedings

Comment. Section 51294.2 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Gov't Code § 53069.4 (technical amendment). Violation of local ordinance; appeal

Comment. Section 53069.4 is amended to revise the reference to the judicial review provisions of the Code of Civil Procedure. See Code Civ. Proc. §§ 1120-1123.950.

Gov't Code § 53595.35 (amended). Remedies of trustees and holders of debt instruments

Comment. Section 53595.35 is amended to replace the former reference to enforcement by mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Local Agencies (part 2)

Gov't Code § 54642 (amended). Enforcement of rights of bondholders

Comment. Section 54642 is amended to replace the former reference to enforcement by mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Gov't Code § 54702.8 (amended). Action by holder of bonds

Comment. Section 54702.8 is amended to replace the former reference to enforcement by mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Gov't Code § 54740.6 (amended). Judicial review

Comment. Section 54740.6 is amended to replace the former references to mandamus with references to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610. The former provision for superior court jurisdiction is continued in substance in Code of Civil Procedure Section 1123.510. The former time limit for a mandamus petition under this section is superseded by the time limit in Code of Civil Procedure Section 1123.640. The former provision for the court to exercise independent judgment on the evidence is superseded by Code of Civil Procedure Section 1123.440 (standard of review of determinations of fact).

Gov't Code § 54960 (amended). Proceeding to prevent violation; recording closed sessions; discovery of tapes

Comment. Section 54960 is amended to replace the former reference to mandamus, injunction or declaratory relief with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610. See also Code Civ. Proc. § 1123.730 (court may grant injunctive or declaratory relief).

Gov't Code § 54960.1 (amended). Proceeding to determine validity of action

Comment. Section 54960.1 is amended to replace the former reference to mandamus or injunction with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Department of Housing and Community Development (part 1), Council of Governments, or Local Government

Gov't Code § 65584 (amended). Local government share of regional housing needs

Comment. Section 65584 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Gov't Code § 65590 (amended). Replacement dwelling units in coastal zone; exemptions

Comment. Section 65590 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Cities and Counties

Gov't Code § 65751 (amended). Action challenging general plan

Comment. Section 65751 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Local Agencies (part 3)

Gov't Code § 66499.37 (amended). Judicial review

Comment. Section 66499.37 is amended to refer to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610. The former limitations provision in Section 66499.37, requiring the action or proceeding to be brought and summons served within 90 days after the date of the decision, is superseded by Code of Civil Procedure Section 1123.640 (90 days after decision announced or required notice given). A summons is not required in judicial review proceedings. See Code Civ. Proc. § 1123.610(c) & Comment.

San Francisco Bay Conservation and Development Commission (part 1)

Gov't Code § 66639 (amended). Judicial review

Comment. Section 66639 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former reference to superior court is continued in substance in Code of Civil Procedure Section 1123.510.

Subdivision (b) is deleted. The contents of the record for judicial review are prescribed in Code of Civil Procedure Section 1123.820. The standard of review of the sufficiency of the evidence is prescribed in Code of Civil Procedure Section 1123.430 (standard of review of determinations of fact).

Gov't Code § 66641.7 (amended). Judicial review; action to collect penalties

Comment. Section 66641.7 is amended to revise the references to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Tahoe Regional Planning Agency

Gov't Code § 66802 (added). Judicial review

Comment. Under Section 66802, judicial review involving the Tahoe Regional Planning Compact is under the judicial review provisions of the Code of Civil Procedure. See Code Civ. Proc. §§ 1120-1123.950. This is consistent with Code of Civil Procedure Sections 1121.120 (other forms of judicial review replaced) and 1123.610 (petition for review). Actions alleging noncompliance with this compact or with an ordinance or regulation of the agency is authorized by Section 66801, Article VI.

Formerly, actions alleging noncompliance with the Tahoe Regional Planning Compact were for ordinary mandamus, declaratory or injunctive relief, or inverse condemnation. See *People ex rel. Younger v. County of El Dorado*, 5 Cal. 3d 480, 487 P.2d 1193, 96 Cal. Rptr. 553 (1971) (mandamus); *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 105 Cal. App. 3d 394, 396, 164 Cal. Rptr. 357 (1980) (mandamus, injunctive relief); *Viso v. State of California*, 92 Cal. App. 3d 15, 154 Cal. Rptr. 580 (1979) (declaratory and injunctive relief, inverse condemnation); *Sierra Tereno v. Tahoe Regional Planning Agency*, 79 Cal. App. 3d 439, 144 Cal. Rptr. 776 (1978) (inverse condemnation). The judicial review provisions in the Code of Civil Procedure replace mandamus and declaratory and injunctive relief in these cases. See Code Civ. Proc. § 1121.120. However, these provisions

cannot replace actions for inverse condemnation. Inverse condemnation is of constitutional origin, and cannot be curtailed by statute. California Government Tort Liability Practice § 2.97, at 181-82 (Cal. Cont. Ed. Bar, 3d ed. 1992). Concerning joinder of a cause of action for inverse condemnation with a judicial review proceeding, see Code Civ. Proc. § 1121.120(b) and Comment.

San Francisco Bay Area Transportation Terminal Authority

Gov't Code § 67620 (amended). Rights and remedies of bondholders

Comment. Subdivision (a) of Section 67620 is amended to refer to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950.

Board of Directors of Industrial Development Authority of City or County

Gov't Code § 91537 (amended). Resolution authorizing issuance of bonds

Comment. Section 91537 is amended to replace the former reference to various proceedings and remedies with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610. The court on review may grant appropriate relief, whether mandatory, injunctive, or declaratory, preliminary or final, temporary or permanent, or equitable or legal. Code Civ. Proc. § 1123.730. See also Code Civ. Proc. § 1121.130 (injunctive relief ancillary).

California Passenger Rail Financing Commission

Gov't Code § 92308 (amended). Rights and remedies of bondholder

Comment. Section 92308 is amended to replace the former reference to enforcement proceedings by mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Department and Commission of Boating and Waterways

Harb. & Nav. Code § 737 (amended). Conduct of proceedings; judicial review

Comment. Section 737 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Board of Pilot Commissioners

Harb. & Nav. Code § 1183 (amended). Trial and judicial review

Comment. Section 1183 is amended to make clear that judicial review of a decision of the board is under the judicial review provisions of the Code of Civil Procedure. The former provision for the court to exercise its independent judgment on the evidence is superseded by Sections 1123.420-1123.460 of the Code of Civil Procedure.

San Diego Unified Port District

Harb. & Nav. Code Appendix 1 § 66 (amended). Enforcement of debt instruments

Comment. Section 66 is amended to replace the former reference to enforcement proceedings by mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Humboldt Bay Harbor, Recreation, and Conservation District

Harb & Nav. Code Appendix 2 § 66 (amended). Enforcement of debt instruments

Comment. Section 66 is amended to replace the former reference to enforcement proceedings by mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

State Department of Health Services (part 1)

Health & Safety Code § 1428 (amended). Contesting citation; penalties; notice of dismissal

Comment. Section 1428 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Health & Safety Code § 1550.5 (amended). Temporary suspension of license

Comment. Section 1550.5 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision for review in superior court is continued in substance in Code of Civil Procedure Section 1123.510.

Health & Safety Code § 1793.15 (amended). Recording notice of lien

Comment. Section 1793.15 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision for filing within 30 days of service of the decision is superseded by Code of Civil Procedure Section 1123.630.

Board of Trustees, Mosquito Abatement District

Health & Safety Code § 2280.1 (amended). Judicial review

Comment. Section 2280.1 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Health & Safety Code § 2861.5 (amended). Judicial review

Comment. Section 2861.5 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Department of Housing and Community Development (part 2)

Health & Safety Code § 17980.8 (amended). (First of two) Abatement of nuisance

Comment. Section 17980.8 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former penultimate sentence of Section 17980.8 is superseded by Code of Civil Procedure Sections 1123.420-1123.460.

Health & Safety Code § 18024.4 (amended). Citation final; judicial review

Comment. Section 18024.4 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

State Department of Health Services (part 2)**Health & Safety Code § 25149 (amended). Endangerment to health and environment**

Comment. Section 25149 is amended to revise the reference to the judicial review provisions. See Code Civ. Proc. §§ 1120-1123.950.

Health & Safety Code § 25187 (amended). Order specifying schedule for compliance

Comment. Section 25187 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former second sentence of subdivision (g) is superseded by Code of Civil Procedure Sections 1123.420-1123.460. The language formerly in subdivision (g) that a petition for a writ of mandate does not stay corrective action or penalties is continued in substance in Code of Civil Procedure Section 1123.720(a).

Health & Safety Code § 25202.7 (amended). Judicial review

Comment. Section 25202.7 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former language requiring the court to uphold the decision of the department if supported by substantial evidence is superseded by Code of Civil Procedure Sections 1123.420-1123.460.

Health & Safety Code § 25231 (amended). Judicial review

Comment. Section 25231 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Health & Safety Code § 25233 (amended). Application for variance

Comment. Section 25233 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former language of subdivision (g) requiring the court to uphold the decision of the director if supported by substantial evidence is superseded by Code of Civil Procedure Sections 1123.420-1123.460.

Health & Safety Code § 25234 (amended). Application to remove land use restriction

Comment. Section 25234 is amended to revise the reference to the provisions for judicial review, see Code Civ. Proc. §§ 1120-1123.950, and to delete the provision for substantial evidence review. Standards of review are prescribed in Code of Civil Procedure Sections 1123.420-1123.460.

Health & Safety Code § 25356.1 (amended). (Operative until July 1, 1998) Remedial action plans; judicial review

Comment. Subdivision (g) of Section 25356.1 is amended to revise the reference to the provisions for judicial review, see Code Civ. Proc. §§ 1120-1123.950, and to delete the provision for substantial evidence review which is continued in substance in Code of Civil Procedure Section 1123.430. The language formerly in subdivision (g) that the filing of a petition for a writ of mandate does not stay removal or remedial action is continued in substance in Code of Civil Procedure Section 1123.720(a).

Health & Safety Code § 25356.8 (amended). (Operative until July 1, 1998) Judicial review

Comment. Subdivision (b) of Section 25356.8 is amended to revise the reference to the provisions for judicial review, see Code Civ. Proc. §§ 1120-1123.950, and to delete the provision prescribing the standard of review which is continued in substance in Code of Civil Procedure Section 1123.430.

Health & Safety Code § 25398.10 (amended). Arbitration panel

Comment. Section 25398.10 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision prescribing the time limit for review is superseded by Code of Civil Procedure Section 1123.630.

**Administering Agency of City, County, or Fire District
on Handling Hazardous Materials****Health & Safety Code § 25514.6 (amended). Complaint by administering agency**

Comment. Section 25514.6 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former reference in subdivision (d) to the superior court is continued in substance in Code of Civil Procedure Section 1123.510. The former

language in subdivision (d) requiring the court to uphold the decision of the agency if supported by substantial evidence is superseded by Code of Civil Procedure Sections 1123.420-1123.460. The former language in subdivision (d) that the filing of a petition for a writ of mandate does not stay accrual of penalties is continued in substance in Code of Civil Procedure Section 1123.720(a).

Redevelopment Agencies (part 1)

Health & Safety Code § 33660 (amended). Rights and remedies of obligee

Comment. Section 33660 is amended to replace the former reference to various enforcement proceedings with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Health & Safety Code § 33781 (amended). Enforcement of rights of holders and trustees

Comment. Section 33781 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950.

Housing Authorities (part 1)

Health & Safety Code § 34362 (amended). Amending or abrogating contract

Comment. Section 34362 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950.

Business, Transportation and Housing Agency

Health & Safety Code § 35823 (amended). Finality of decision; hearing; judicial review

Comment. Section 35823 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former penultimate sentence of Section 35823 is superseded by Code of Civil Procedure Sections 1123.420-1123.460 (standard of review) and 1123.850 (new evidence on judicial review).

Cities and Counties (part 2), and
Redevelopment Agencies (part 2)

Health & Safety Code § 37646 (amended). Actions to protect or enforce rights

Comment. Section 37646 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950.

Cities and Counties (part 3), Redevelopment
Agencies (part 3), and Housing Authorities (part 2)

Health & Safety Code § 37936 (amended). Actions to protect or enforce rights

Comment. Section 37936 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950.

Air Pollution Control Hearing Boards

Health & Safety Code § 40864 (amended). Judicial review

Comment. Section 40864 is amended to replace the former reference to judicial review by writ of mandate with a reference to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950. The time limit formerly in subdivision (a) is superseded by Code of Civil Procedure Section 1123.630. Former subdivision (b) is superseded by Code of Civil Procedure Sections 1123.830 (preparation of administrative record) and 1123.910 (fee for preparation of record). Former subdivision (c) is superseded by Code of Civil Procedure Section 1123.820 (contents of administrative record). The former first sentence of subdivision (d) (extension of time after request for record) is superseded by Code of Civil Procedure Section 1123.650(b)(2).

State Air Resources Board

Health & Safety Code § 42316 (amended). Mitigation of impact of water activities

Comment. Section 42316 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in subdivision (b) prescribing the time limit for review is superseded by Code of Civil Procedure Section 1123.630.

Health & Safety Code § 44011.6 (amended). Test for smoke emissions; penalties; administrative hearing

Comment. Section 44011.6 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in subdivision (m) prescribing the time limit for judicial review is superseded by Code of Civil Procedure Section 1123.630.

California Pollution Control Financing Authority**Health & Safety Code § 44554 (amended). Rights and remedies of bondholder**

Comment. Section 44554 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950.

Cities and Counties (part 4)**Health & Safety Code § 52033 (amended). Resolution authorizing issuance of bonds; security; enforcement rights**

Comment. Section 52033 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

State Department of Health Services (part 3)**Health & Safety Code § 108900 (amended). Civil and criminal penalties**

Comment. Section 108900 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former language in subdivision (f) requiring the petition to be filed in superior court is continued in substance in Code of Civil Procedure Section 1123.510. The former language in subdivision (f) requiring the court to uphold the decision of the director if supported by substantial evidence is superseded by Code of Civil Procedure Sections 1123.420-1123.460. The former language in subdivision (f) that the filing of a petition for a writ of mandate does not stay corrective action or penalties is continued in substance in Code of Civil Procedure Section 1123.720(a).

Health & Safety Code § 110915 (amended). Civil penalties; hearing; review; civil action

Comment. Subdivision (e) of Section 110915 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in subdivision (e) permitting judicial review to be sought by “any person” is superseded by Code of Civil Procedure Sections 1123.210-1123.240 (standing). This may not be a significant substantive change, because the former reference to “any person” may have been qualified by the provision in Code of Civil Procedure Section 1086 permitting mandamus to be sought by a party “beneficially interested.” The former provision in subdivision (e) on the time limit to seek judicial review is superseded by Code of Civil Procedure Section 1123.630.

Health & Safety Code § 111855 (amended). Civil penalties

Comment. Section 111855 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former language in subdivision (g) requiring the petition to be filed in superior court is continued in substance in Code of Civil Procedure Section 1123.510. The former language in subdivision (g) prescribing the time limit for review is superseded by Code of Civil Procedure Section 1123.630. The former language in subdivision (g) requiring the court to uphold the decision of the director if supported by substantial evidence is superseded by Code of Civil Procedure Sections 1123.420-1123.460. The former language in subdivision (g) that the filing of a petition for a writ of mandate does not stay corrective action or penalties is continued in substance in Code of Civil Procedure Section 1123.720(a).

Health & Safety Code § 111940 (amended). Civil penalties

Comment. Section 111940 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former language in subdivision (g) prescribing the time for review is superseded by Code of Civil Procedure Section 1123.630. The former reference in subdivision (g) to the superior court is continued in substance in Code of Civil Procedure Section 1123.510. The former language in subdivision (g) requiring the court to uphold the decision of the director if supported by substantial evidence is superseded by Code of Civil Procedure Sections 1123.420-1123.460. The former language in subdivision (g) that the filing of a petition for a writ of mandate does not stay required corrective action is continued in substance in Code of Civil Procedure Section 1123.720(a).

Health & Safety Code § 112615 (amended). Judicial review

Comment. Section 112615 is amended to insert a reference to the provisions for judicial review, see Code Civ. Proc. §§ 1120-1123.950, and to delete the time limit for filing a petition for review. The time to file a petition for review is provided in Code of Civil Procedure Section 1123.630.

Resources Agency**Health & Safety Code § 113220 (amended). Extension of time; administrative appeal**

Comment. Section 113220 is amended to make clear judicial review is under the Code of Civil Procedure. See Code Civ. Proc. §§ 1120-1123.950.

State Department of Health Services (part 4)**Health & Safety Code § 115155 (amended). Judicial review**

Comment. Section 115155 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Health & Safety Code § 116625 (amended). Revocation or suspension of permit; judicial review

Comment. Subdivision (b) of Section 116625 is amended to replace the former reference to a writ of mandate with a reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former reference to the superior court is also deleted. This is nonsubstantive, since judicial review under the Code of Civil Procedure is in the superior court. Code Civ. Proc. § 1123.510.

Health & Safety Code § 116700 (amended). Judicial review

Comment. Section 116700 is amended to revise the reference to the provisions for judicial review, and to apply all of the judicial review provisions of the Code of Civil Procedure, and not merely the two subdivisions formerly mentioned. See Code Civ. Proc. §§ 1120-1123.950. The former time limit in subdivision (a) is superseded by Code of Civil Procedure Section 1123.630. Section 116700 is also amended to delete provisions formerly in subdivision (b), which are superseded by Code of Civil Procedure Sections 1123.420-1123.460 (standard of review) and 1123.850 (new evidence on judicial review). The former reference to superior court is continued in substance in Code of Civil Procedure Section 1123.510.

Health & Safety Code § 121270 (amended). AIDS Vaccine Victims Compensation Fund

Comment. Section 121270 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former time limits provided in subdivision (i) are superseded by Code of Civil Procedure Section 1123.630.

Health & Safety Code § 123340 (amended). Certificate of amounts unpaid; judicial review

Comment. Section 123340 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Advisory Health Council

Health & Safety Code § 127275 (amended). Judicial review

Comment. Section 127275 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former last sentence of Section 127275 (substantial evidence review) is superseded by Code of Civil Procedure Section 1123.430. The provision for judicial review by any party “other than the department” is a special exception to the standing rules of Sections 1123.220-1123.240.

Office of Statewide Health Planning and Development

Health & Safety Code § 128775 (amended). (Operative on July 1, 1997) Administrative and judicial review

Comment. Section 128775 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former penultimate sentence of Section 128775 (substantial evidence review) is superseded by Code of Civil Procedure Section 1123.430. Former subdivision (e) (delayed operative date) is deleted as no longer necessary.

Insurance Commissioner

Ins. Code § 728 (amended). Removal or suspension of officer or employee of insurer

Comment. Section 728 is amended to revise the reference to the provisions for judicial review, see Code Civ. Proc. §§ 1120-1123.950, and to delete the provisions in subdivisions (f) and (i) for independent judgment review. Standards of review are prescribed in Code of Civil Procedure Sections 1123.420-1123.460.

Ins. Code § 791.18 (amended). Judicial review

Comment. Section 791.18 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in subdivision (a) prescribing the time for review is superseded by Code of Civil Procedure Section 1123.630. The former last sentence of subdivision (a) is superseded by Code of Civil Procedure Section 1123.730 (type of relief).

Ins. Code § 1065.4 (amended). Judicial review

Comment. Section 1065.4 is amended to make clear judicial review is under Code of Civil Procedure Sections 1120-1123.950. The former 60-day time limit in Section 1065.4 is superseded by Code of Civil Procedure Section 1123.630.

Ins. Code § 1104.9 (amended). Maintenance of securities and money in other jurisdictions

Comment. Section 1104.9 is amended to replace the former reference to a writ of mandate and declaratory relief with a reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Ins. Code § 1748.5 (amended). Suspension or removal from office or employment

Comment. Subdivision (f) of Section 1748.5 is amended to replace the former reference to a writ of mandate under Code of Civil Procedure Section 1085 with a reference to the provisions for judicial review of Code of Civil Procedure Sections 1120-1123.950. The former provisions in subdivisions (f) and (i) for independent judgment review are superseded by Code of Civil Procedure Section 1123.430 (substantial evidence review of fact-finding).

Ins. Code § 1780.63 (amended). Judicial review

Comment. Section 1780.63 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former last sentence of subdivision (a) is superseded by Code of Civil Procedure Sections 1123.420-1123.460 (standards of review). The former 30-day limit in subdivision (b) is continued in substance in Code of Civil Procedure Section 1123.630. The former language in subdivision (b) permitting the court to order a stay for good cause is continued in substance in Code of Civil Procedure Section 1123.720.

Ins. Code § 1858.6 (amended). Judicial review

Comment. Section 1858.6 is amended to make clear judicial review is under Code of Civil Procedure Sections 1120-1123.950. The former

provision for independent judgment review is superseded by Code of Civil Procedure Section 1123.430 (substantial evidence review of fact-finding).

Ins. Code § 11754.5 (amended). Judicial review

Comment. Section 11754.5 is amended to revise the reference to the judicial review provisions of the Code of Civil Procedure. See Code Civ. Proc. §§ 1120-1123.950.

Ins. Code § 12414.19 (amended). Judicial review

Comment. Section 12414.19 is amended to make clear judicial review is under Code of Civil Procedure Sections 1120-1123.950. The former provision for independent judgment review is superseded by Code of Civil Procedure Section 1123.430 (substantial evidence review of fact-finding).

Volunteer Fire Departments

Lab. Code § 1964 (amended). Removal of volunteer firefighter; hearing; judicial review

Comment. Section 1964 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former language in subdivision (c) on the standard of review is superseded by Code of Civil Procedure Sections 1123.420-1123.460 (standards of review).

Military Department

Mil. & Vet. Code § 489 (amended). Judicial review

Comment. Section 489 is amended to replace the former reference to mandamus or other appropriate proceedings with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Mil. & Vet. Code § 1005.1. Authorization to compel performance of duty of state official

Comment. Section 1005.1 is amended to replace the former reference to mandamus or other appropriate proceedings with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Local Mental Health Director

Penal Code § 4011.8 (amended). Voluntary inpatient or outpatient mental health services

Comment. Section 4011.8 is amended to add the last sentence to make clear that a denial of an application for voluntary mental health services by an executive branch agency is reviewable only under the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Department of Justice

Penal Code § 11126 (amended). Correction of record

Comment. Section 11126 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Department of Conservation (part 1)

Pub. Res. Code § 2774.2 (amended). Review of administrative penalties

Comment. Section 2774.2 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former reference in subdivision (e) to the superior court is continued in substance in Code of Civil Procedure Section 1123.510. The former provision in subdivision (e) for independent judgment review is superseded by Code of Civil Procedure Sections 1123.420-1123.460 (standards of review).

Pub. Res. Code § 2774.4 (amended). Lead agency powers; hearing; review

Comment. Section 2774.4 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former reference in subdivision (f) to the superior court is continued in substance in Code of Civil Procedure Section 1123.510. The former provision in subdivision (f) for independent judgment review is superseded by Code of Civil Procedure Sections 1123.420-1123.460 (standards of review).

State Oil and Gas Supervisor

Pub. Res. Code § 3236.5 (amended). Civil penalties; judicial review

Comment. Section 3236.5 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Pub. Res. Code § 3333 (amended). Judicial review

Comment. Section 3333 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former requirement specifying the time for judicial review is superseded by Code of Civil Procedure Section 1123.630. The special provision in subdivision (a) for venue in the superior court of any county in which all or part of the area affected is located prevails over the general venue provision in Code of Civil Procedure Section 1123.520. See Code Civ. Proc. § 1121.110 (conflicting or inconsistent statute controls).

The former provision in subdivision (b) for a notice of intention to petition for judicial review is deleted as superfluous, since the petition itself must generally be filed within 60 days after the order. See Code Civ. Proc. § 1123.630 and Comment.

Department of Conservation (part 2)

Pub. Res. Code § 14591.5 (amended). Judgment to collect civil penalties or restitution

Comment. Section 14591.5 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

State Energy Resources Conservation and Development Commission

Pub. Res. Code § 25534.2 (amended). Judicial review; action to recover penalties

Comment. Section 25534.2 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in Section 25534.2 prescribing the time for review is superseded by Code of Civil Procedure Section 1123.630.

Pub. Res. Code § 25901 (amended). Judicial review

Comment. Section 25901 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in subdivision (a) prescribing the time for review is

superseded by Code of Civil Procedure Section 1123.630. The standards of review formerly in subdivision (b) are superseded by Code of Civil Procedure Sections 1123.420-1123.460.

California Alternative Energy and Advanced Transportation Financing Authority

Pub. Res. Code § 26034 (amended). Rights and remedies of bondholder

Comment. Section 26034 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

San Francisco Bay Conservation and Development Commission (part 2)

Pub. Res. Code § 29602 (amended). Judicial review

Comment. Section 29602 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision permitting an “aggrieved” person to seek judicial review is superseded by Code of Civil Procedure Sections 1123.210-1123.240 (standing).

Pub. Res. Code § 29603 (amended). Judicial review

Comment. Section 29603 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision permitting an “aggrieved” person to seek judicial review is superseded by Code of Civil Procedure Sections 1123.210-1123.240 (standing). The provision permitting an applicant for a marsh development permit or the commission to seek judicial review is a special provision that controls over the general standing rules of Code of Civil Procedure Sections 1123.210-1123.240. See Code Civ. Proc. § 1121.110 (conflicting or inconsistent statute controls).

Delta Protection Commission

Pub. Res. Code § 29772 (amended). Judicial review

Comment. Section 29772 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

The former provision permitting an “aggrieved” person to seek judicial review is superseded by Code of Civil Procedure Sections 1123.210-1123.240 (standing).

California Coastal Commission

Pub. Res. Code § 30801 (amended). Judicial review

Comment. Section 30801 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Pub. Res. Code § 30802 (amended). Judicial review of action of local government

Comment. Section 30802 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

California Urban Waterfront Area Restoration Financing Authority

Pub. Res. Code § 32205 (amended). Action to enforce rights

Comment. Section 32205 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950.

California Integrated Waste Management Board

Pub. Res. Code § 41721.5 (amended). Amendments

Comment. Section 41721.5 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Pub. Res. Code § 42854 (amended). Judicial review

Comment. Section 42854 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former 30-day time period in subdivision (a) is superseded by Code of Civil Procedure Section 1123.630. The former requirement that the petition be filed in superior court is continued in substance in Code of Civil Procedure Section 1123.510. The former provision in subdivision (b) for substantial evidence review is superseded by Code of Civil Procedure Sections 1123.420-1123.460 (standards of review).

Former subdivision (c) (petition for writ of mandate does not stay corrective action or penalties) is continued in substance in Code of Civil

Procedure Section 1123.720(a). Former subdivision (d) is superseded by Code of Civil Procedure Section 1123.730 (type of relief).

Pub. Res. Code § 50000 (amended). Review and approval of new sites

Comment. Section 50000 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Municipal Utility Districts

Pub. Util. Code § 13106 (amended). Rights and remedies of bond holders

Comment. Section 13106 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Pub. Util. Code § 13575.7 (amended). Judicial review; nonexclusiveness of remedy

Comment. Section 13575.7 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in subdivision (a) specifying the time limit for review is superseded by Code of Civil Procedure Section 1123.630. The former first sentence of subdivision (b) concerning the contents of the record is superseded by Code of Civil Procedure Sections 1123.820 (contents of administrative record) and 1123.850 (new evidence on judicial review). The former last sentence of subdivision (b) (independent judgment) is superseded by Code of Civil Procedure Sections 1123.420-1123.460.

California Transportation Commission (part 1)

Pub. Util. Code § 21675.2 (amended). Judicial review; public notice

Comment. Section 21675.2 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Department of Aeronautics,
Business and Transportation Agency

Pub. Util. Code § 24252 (amended). Judicial review

Comment. Section 24252 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former reference to Government Code Section 11440 is obsolete because it was repealed by 1979 Cal. Stat. ch. 567.

Southern California Rapid Transit District

Pub. Util. Code § 30981 (amended). Rights and remedies of bond holders

Comment. Section 30981 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Santa Clara County Transit District

Pub. Util. Code § 100492 (amended). Rights and remedies of bond holders

Comment. Section 100492 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Sacramento Regional Transit District

Pub. Util. Code § 102602 (amended). Rights and remedies of bond holders

Comment. Section 102602 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

San Mateo County Transit District

Pub. Util. Code § 103602 (amended). Rights and remedies of bond holders

Comment. Section 103602 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

San Diego Metropolitan Transit Development Board

Pub. Util. Code § 120702 (amended). Rights and remedies of bond holders

Comment. Section 120702 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

West Bay Rapid Transit Authority

Pub. Util. Code Appendix 2 § 10.1 (amended). Rights and remedies of bond holders

Comment. Section 10.1 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950.

County Boards of Supervisors (part 3)

Rev. & Tax. Code § 1611.6 (technical amendment). Attorney's fees

Comment. Section 1611.6 is amended to revise the references to former Section 800 of the Government Code.

Franchise Tax Board

Rev. & Tax. Code § 19381 (technical amendment). No injunction to prevent tax

Comment. Section 19381 is amended to make clear the judicial review provisions of the Code of Civil Procedure may not be used to prevent the assessment or collection of a tax under this part.

Cities and Counties (part 5)

Sts. & Hy. Code § 5302.5 (amended). Assessment as obligation of owner of property; time for payment; collection of tax levy; judicial review

Comment. Section 5302.5 is amended to replace the former references to mandamus and other remedies with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Sts. & Hy. Code § 6467 (amended). Certificates representing unpaid assessments

Comment. Section 6467 is amended to replace the former references to mandamus and other remedies with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Sts. & Hy. Code § 6468 (amended). Form of bond

Comment. Section 6468 is amended to replace the former references to mandamus and other remedies with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

California Transportation Commission (part 2)

Sts. & Hy. Code § 30238 (amended). Performance of duties may be compelled

Comment. Section 30238 is amended to replace the former references to mandamus and other remedies with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

El Dorado County Toll Tunnel Authority

Sts. & Hy. Code § 31171 (amended). Rights and remedies of bondholder

Comment. Section 31171 is amended to replace the former references to mandamus and other proceedings with a reference to the judicial

review provisions of Code of Civil Procedure Sections 1120-1123.950. The last sentence of Section 31171 is made expressly subject to Code of Civil Procedure Section 1121.120, which provides that the judicial review provisions of the Code of Civil Procedure replace other forms of action for judicial review of agency action.

Parking Authorities of Cities or Counties

Sts. & Hy. Code § 33400 (amended). Powers of obligee

Comment. Subdivision (a) of Section 33440 is amended to replace the former reference to mandamus and other proceedings with a reference to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950.

Subdivision (b) is amended to make clear that proceedings in equity are authorized only against nongovernmental parties, consistent with Code of Civil Procedure Section 1121.120 (other forms of judicial review replaced for review of governmental action).

Cities or Parking Districts

Sts. & Hy. Code § 35417 (amended). Ordinance as covenant for protection of bondholder

Comment. Section 35417 is amended to replace the former reference to mandamus and other remedies with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Sts. & Hy. Code § 35468 (amended). Tax levy to pay assessment on public property

Comment. Section 35468 is amended to replace the former reference to mandamus and other proceedings with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

California Unemployment Insurance Appeals Board

Unemp. Ins. Code § 409.2 (amended). Judicial review of precedent decision

Comment. Section 409.2 is amended to replace the former reference to an action for declaratory relief with a reference to judicial review

under Code of Civil Procedure Sections 1120-1123.950. The former reference to the superior court is continued in substance in Code of Civil Procedure Section 1123.510.

Unemp. Ins. Code § 1338 (technical amendment). Decision allowing benefits

Comment. Section 1338 is amended to replace the former reference to mandamus with a reference to judicial review. A petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Unemp. Ins. Code § 3264 (amended). Denial of liability; judicial review

Comment. Section 3264 is amended to replace the former reference to a writ of mandate with a reference to judicial review under Code of Civil Procedure Sections 1120-1123.950.

New Motor Vehicle Board

Veh. Code § 3058 (amended). Judicial review

Comment. Section 3058 is amended to make clear judicial review is under the judicial review provisions of the Code of Civil Procedure, see Code Civ. Proc. §§ 1120-1123.950, and to delete the last sentence. The time to file a petition for review is provided in Code of Civil Procedure Section 1123.630.

Veh. Code § 3068 (amended). Judicial review

Comment. Section 3068 is amended to make clear judicial review is under the judicial review provisions in the Code of Civil Procedure, see Code Civ. Proc. §§ 1120-1123.950, and to delete the last sentence. The time to file a petition for review is provided in Code of Civil Procedure Section 1123.630.

Public Agencies (part 4)

Veh. Code § 22851.3 (amended). Disposition of low-value vehicles

Comment. Section 22851.3 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

State Water Resources Control Board (part 1)

Water Code § 1126 (amended). Judicial review

Comment. Section 1126 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in subdivision (a) for an “aggrieved party” to seek review is continued in substance in Code of Civil Procedure Section 1123.220 (“interested person”). The former provision in subdivision (a) specifying the time limit for review is superseded by Code of Civil Procedure Section 1123.630. The former second sentence of subdivision (a) (right to review not affected by failure to seek reconsideration) is continued in substance in Code of Civil Procedure Section 1123.320 (exhaustion of administrative remedies). The former third sentence of subdivision (a) (time to file petition extended during reconsideration) is superseded by Code of Civil Procedure Section 1123.630(c).

The former second sentence of subdivision (b) (independent judgment review) is superseded by Code of Civil Procedure Sections 1123.410-1123.460 (standards of review).

Water Code § 2504 (added). Inapplicability of Code of Civil Procedure provisions

Comment. Section 2504 makes clear the judicial review provisions of the Code of Civil Procedure do not apply to statutory adjudication under this chapter.

Department of Water Resources

Water Code § 6357.4 (amended). Notice and hearing; judicial review

Comment. Section 6357.4 is amended to delete the last sentence. The writ of mandate to review agency action has been replaced by a proceeding for judicial review under Code of Civil Procedure Sections 1120-1123.950. The former last sentence of Section 6357.4 is superseded by Code of Civil Procedure Section 1123.630 (time for filing petition for review in adjudicative proceeding).

Water Code § 6461 (amended). Certificate of approval; judicial review

Comment. Section 6461 is amended to delete the last sentence. The writ of mandate to review agency action has been replaced by a proceeding for judicial review under Code of Civil Procedure Sections 1120-1123.950. The former last sentence of Section 6461 is superseded

by Code of Civil Procedure Section 1123.630 (time for filing petition for review in adjudicative proceeding).

Reclamation Boards

Water Code § 9266 (amended). Compelling performance of duties

Comment. Section 9266 is amended to replace the former reference to mandamus and other remedies with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

State Departments Generally

Water Code § 11708 (amended). Proceedings to compel performance of duties

Comment. Section 11708 is amended to replace the former reference to mandamus and other proceedings with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

State Water Resources Control Board (part 2) and Regional Water Quality Control Boards

Water Code § 13330 (amended). Judicial review

Comment. Section 13330 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in subdivision (a) specifying the time within which review must be sought is superseded by Code of Civil Procedure Section 1123.630. The former provision in subdivisions (a) and (b) for superior court jurisdiction is continued in substance in Code of Civil Procedure Section 1123.510. The provision formerly in subdivision (d) for independent judgment review is superseded by Code of Civil Procedure Sections 1123.420-1123.460 (standards of review). The former references in subdivisions (a), (b), (c), and (e) to an “aggrieved” party are continued in substance in Code of Civil Procedure Section 1123.220 (“interested” person).

California Water Districts

Water Code § 36391 (amended). Compelling protection of revenues pledged for security

Comment. Section 36391 is amended to replace the former reference to mandamus and other proceedings with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610. The last sentence of Section 36391 is made expressly subject to Code of Civil Procedure Section 1121.120, which provides that the judicial review provisions of the Code of Civil Procedure replace other forms of action for judicial review of agency action.

California Water Storage Districts

Water Code § 44961 (amended). Judicial review; protection of security

Comment. Section 44961 is amended to replace the former reference to mandamus and other proceedings with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610. The last sentence of Section 44961 is made expressly subject to Code of Civil Procedure Section 1121.120, which provides that the judicial review provisions of the Code of Civil Procedure replace other forms of action for judicial review of agency action.

Kings River Conservation District

Water Code Appendix § 59-33 (amended). Bonds for construction of works

Comment. Section 33 is amended to replace the former reference to mandamus and other actions with a reference to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950.

Yolo County Flood Control and Water Conservation District

Water Code Appendix § 65-4.8 (amended). Notice of ground water charge

Comment. Section 4.8 is amended to revise the reference to the judicial review provisions of the Code of Civil Procedure. The former

provision specifying the time within which review must be sought is superseded by Code of Civil Procedure Section 1123.640 (time limit for judicial review of adjudicative proceeding). The former provision in the last sentence of Section 4.8 for independent judgment review is superseded by Code of Civil Procedure Sections 1123.420-1123.460 (standards of review).

Sierra Valley Groundwater Management District; Long Valley Groundwater Basin

Water Code Appendix § 119-406 (amended). Judicial review

Comment. Section 406 is amended to replace the former reference to a writ of mandate with a reference to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950. The former reference to superior court is continued in substance in Code of Civil Procedure Section 1123.510.

Mono County Tri-Valley Groundwater Management District

Water Code Appendix § 128-504 (amended). Review of ordinance or resolution

Comment. Section 504 is amended to replace the former reference to a writ of mandate with a reference to judicial review provisions of Code of Civil Procedure Sections 1120-1123.950. The former reference to superior court is continued in substance in Code of Civil Procedure Section 1123.510.

Honey Lake Valley Groundwater Management District

Water Code Appendix § 129-421 (amended). Review of ordinance or resolution

Comment. Section 421 is amended to replace the former reference to a writ of mandate with a reference to judicial review provisions of Code of Civil Procedure Sections 1120-1123.950. The former reference to superior court is continued in substance in Code of Civil Procedure Section 1123.510.

San Diego Area Wastewater Management District

Water Code Appendix § 133-510 (amended). (Operative date contingent) Bonds, notes, and other evidence of indebtedness; dissolution of district or withdrawal of territory

Comment. Section 510 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

San Gabriel Basin Water Quality Authority

Water Code Appendix § 134-604 (amended). (Operative until July 1, 2002) Evidences of indebtedness

Comment. Section 604 is amended to replace the former reference to mandamus with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

Willow Creek Valley Groundwater Management District

Water Code Appendix § 135-421 (amended). Judicial review

Comment. Section 421 is amended to replace the former reference to a writ of mandate with a reference to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950. The former reference to superior court is continued in substance in Code of Civil Procedure Section 1123.510.

Regional Centers for the Developmentally Disabled

Welf. & Inst. Code § 4668 (amended). Actions void; judicial review

Comment. Section 4668 is amended to replace the former reference to an action by mandamus, injunction, or declaratory relief with a reference to the judicial review provisions of Code of Civil Procedure Sections 1120-1123.950.

Counties

Welf. & Inst. Code § 5655 (amended). Cooperation with county; sanctions

Comment. Section 5655 is amended to replace the former reference to mandamus and other actions with a reference to the judicial review provisions of the Code of Civil Procedure. Under those provisions, a petition for review is the proper way to obtain judicial review of agency action. See Code Civ. Proc. §§ 1121.120, 1123.610.

State Department of Social Services (part 1)

Welf. & Inst. Code § 10605 (amended). Noncompliance in county administration; review

Comment. Section 10605 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Welf. & Inst. Code § 10605.2 (amended). County noncompliance

Comment. Section 10605.2 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

State Department of Health Services (part 5)

Welf. & Inst. Code § 10744 (amended). County noncompliance; sanctions; review

Comment. Section 10744 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former last clause of the last sentence of Section 10744 concerning injunctive relief is continued in substance in Code of Civil Procedure Section 1123.730 (court may grant injunctive relief on judicial review).

State Department of Social Services (part 2)

Welf. & Inst. Code § 11468.5 (amended). Judicial review

Comment. Section 11468.5 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Welf. & Inst. Code § 11468.6 (amended). Review of group home audit findings

Comment. Section 11468.6 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

State Department of Health Services (part 5)

Welf. & Inst. Code § 14087.27 (amended). Judicial or administrative review

Comment. Section 14087.27 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Welf. & Inst. Code § 14105.405 (amended). (Operative until January 1, 1999) Fair hearing

Comment. Section 14105.405 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former reference to superior court is continued in substance in Code of Civil Procedure Section 1123.510.

Welf. & Inst. Code § 14171 (amended). Administrative appeal; interest

Comment. Section 14171 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950.

Department of Rehabilitation

Welf. & Inst. Code § 19709 (amended). Judicial review

Comment. Section 19709 is amended to revise the reference to the provisions for judicial review. See Code Civ. Proc. §§ 1120-1123.950. The former provision in subdivision (a) limiting review to questions of law is not continued. Both questions of law and questions of fact are reviewable under the Code of Civil Procedure. See Code Civ. Proc. §§ 1123.420-1123.460.

BACKGROUND STUDIES

Asimow, <i>Judicial Review: Standing and Timing</i> (Sept. 1992)	229
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JUDICIAL REVIEW: STANDING AND TIMING *

by Michael Asimow

September 1992

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INTRODUCTION

The present California law relating to judicial review of the actions of state and local government agencies is a bewildering patchwork. This study discusses the existing statutory and decisional law relating to judicial review and suggests adoption of modernized code sections. This portion of the study will consider matters relating to standing to seek review and timing of review. The next portion of the study will consider abolition of the writ system in favor of a unified judicial review statute; it will also consider the proper court in which to seek review and the scope of judicial review.

The Law Revision Commission's administrative law project has, up until this point, concentrated solely on adjudication by state agencies; it made no effort to prescribe the rules for local government adjudication. This made sense since there are major differences between adjudication by state government agencies and that performed by the myriad of local government entities. However, the Commission should consider a different approach when considering judicial review. The existing code sections and precedents draw little or no distinction between the review of state action and local government action. Therefore, I propose that the Commission's recommendations relating to judicial review extend to agencies of local government as well as state government. Otherwise, the vast body of existing law must be left in place to regulate review of local government action and there would be sharp differ-

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ences between the review of state and local action. Since this study will show that existing law is unnecessarily confusing and often of dubious merit, it seems appropriate that all of it be modernized.

In addition, the Commission's previous recommendations concerned adjudication, not rulemaking. It has determined to put off recommendations relating to rulemaking until the future. However, the studies relating to judicial review will include material relating to the judicial review of rules and other non-adjudicatory agency action. Again, if this is not done, the corpus of existing judicial review law would have to be preserved for review of non-adjudicatory action. There would be sharp differences in the provisions relating to the review of adjudicatory and non-adjudicatory action. Again, that seems like an unwise result.

The overall goal of the Commission's recommendations should be to supersede the existing antiquated writ system with a single unified judicial review statute. Such a statute would replace the existing writs of ordinary mandate,¹ "certiorarified" mandate,² certiorari,³ and declaratory relief⁴ insofar as these remedies apply to the review of state or local agency action. Each of these remedies is weighted down by the barnacles of decades or centuries. A modern statute would unify the provisions relating to review of agency action and would codify all of the various doctrines relating to review (such as standing and timing doctrines) that now lurk in the case law.

I. STANDING TO SEEK JUDICIAL REVIEW

Among the most fundamental judicial review issues is that of standing: who can seek judicial review of agency action? Surprisingly, California law on standing, although mostly uncodified, works well. It is almost completely free of the result-oriented, con-

1. Code Civ. Proc. §§ 1084-1097. All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

2. Section 1094.5.

3. Sections 1067-1077. The writ of certiorari is called the "writ of review" by these sections.

4. Section 1060.

fusing, and perverse limitations imposed on standing in the federal courts.⁵ Thus the Commission should build on strength by codifying the principles that the courts have already worked out.

A. EXISTING LAW

Existing law relating to standing breaks down conveniently into four categories: private interest, public interest, taxpayer suits, and third-party standing. Essentially, plaintiffs are allowed into court to challenge state or local government action if they can satisfy the criteria for any one of these categories. As will be discussed in greater detail in the second judicial review study, persons seeking judicial review under present law must decide under which writ to proceed. In most cases, they seek a writ of mandate (called *mandamus* at common law). In California, mandate is used to review two very different sorts of agency action. Ordinary or traditional mandate is used when plaintiff claims that a government body has failed to perform a non-discretionary act that the law requires it to perform.⁶ So-called “certiorarified” mandate⁷ reviews an agency decision resulting from a trial type hearing. In some circumstances, a taxpayer action is appropriate.⁸ Under other circumstances, declaratory judgment⁹ or the writ of review (called *certiorari* at common law)¹⁰ is used.

In each case, the statute states a standing requirement. In the case of mandate and review, a plaintiff must be “beneficially inter-

5. This is one area where California should not follow the 1981 Model Act which has incorporated the unsatisfactory federal approach. The 1981 Model State Administrative Procedure Act is printed in 15 U.L.A. 1 (1990) [hereinafter MSAPA].

6. Section 1085.

7. Section 1094.5. The “certiorarified” adjective has long been used to describe the Section 1094.5 procedure because it adapted *mandamus* to cover matters historically reviewed under the writ of *certiorari*. The bizarre historical evolution of Section 1094.5 will be discussed in the second phase of this study.

8. Section 526a.

9. Section 1060 *et seq.*

10. Section 1068.

ested.”¹¹ A taxpayer plaintiff must be a citizen of the local jurisdiction involved in the suit.¹² In the case of declaratory judgment, a plaintiff must be “interested” under a written instrument or contract or desire a declaration of his rights or duties.¹³ In general, these provisions mirror the general California rule relating to appeals from trial court judgments: a party seeking review must be “aggrieved.”¹⁴

There is a large body of case law that fills out (and indeed expands beyond all recognition) the meaning of these Delphic phrases. Despite occasional detours, the courts have worked out a scheme of judicial review that seems to allow the right plaintiffs to challenge agency action without at the same time creating a vast body of confusion (as the federal courts have done in trying to solve the same problem).

1. Private Interest

Most persons seeking judicial review of agency action unquestionably have standing to do so. The action is directed at them; it deprives them of a legal interest or requires them to take action or prohibits them from doing so. Standing is never an issue in such situations because the plaintiff’s private interests are directly and adversely affected. Consequently, they meet the “beneficial interest” test contained in the mandate provision or the “interested” test in the declaratory judgment statute.

a. “Over and above” test

The beneficial interest test is also satisfied where plaintiff incurs some sort of practical harm even if an order is not directed at him and does not deprive him of a legal right. According to the cases, a plaintiff’s private interest is sufficient to confer standing where that

11. Sections 1069, 1086.

12. Section 526a. If plaintiff is a corporation, it must have paid a tax to the local jurisdiction that is the subject of the suit. *Id.*

13. Section 1060.

14. Section 902. See *Association of Psychology Providers v. Rank*, 51 Cal. 3d 1, 270 Cal. Rptr. 796 (1990) (psychiatrists are “aggrieved” and thus have standing to appeal from a trial court decision striking down a regulation that might shift income or responsibility from psychiatrists to psychologists).

interest is “over and above” that of the members of the general public.¹⁵ The cases have been generous in granting standing to persons with quite attenuated pecuniary interests who, nevertheless, can claim some actual or potential harm that distinguishes them from the general public.¹⁶ Earlier cases that imposed stricter standards are no longer followed.¹⁷

In addition, the courts treat non-pecuniary injuries, such as environmental or aesthetic claims, as sufficient to meet the private interest test.¹⁸ Moreover, persons who were made parties to an administrative proceeding automatically have standing to appeal

15. *Carsten v. Psychology Examining Comm.*, 27 Cal. 3d 793, 796, 166 Cal. Rptr. 844 (1980). See *Professional Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal. 2d 276, 284-85, 384 P.2d 158 (1963) (union president has standing in both representative and personal capacities to litigate discrimination against union members even though he has not personally been victim of discrimination).

16. See, e.g., *Association of Psychology Providers v. Rank*, 51 Cal. 3d 1, 270 Cal. Rptr. 796 (1990) (psychiatrists can challenge regulation that diminished sphere of responsibility of psychiatrists vis-à-vis psychologists); *Chas. L. Harney, Inc. v. Contractors' State License Bd.*, 39 Cal. 2d 561, 247 P.2d 913 (1952) (contractor can challenge regulations preventing it from bidding on certain jobs even though it has no plans to bid on any such jobs); *Pacific Legal Found. v. UIAB* 74 Cal. App. 3d 150, 141 Cal. Rptr. 474 (1977) (plaintiff has employees — thus can challenge UIAB precedent decision that might someday adversely affect it); *Sperry & Hutchinson v. State Bd. of Pharmacy*, 241 Cal. App. 2d 229, 50 Cal. Rptr. 489 (1966) (stamp company can challenge regulation banning pharmacists from giving trading stamps); *Gowens v. City of Bakersfield*, 179 Cal. App. 2d 282, 3 Cal. Rptr. 746 (1960) (hotel required to collect tax from lodgers has standing to challenge tax).

17. See, e.g., *United States v. Superior Court*, 19 Cal. 2d 189, 197-98, 120 P.2d 26 (1941) (since statute is directed at agricultural handlers, growers have no standing even though the order in question will prevent handlers from purchasing their oranges).

18. See, e.g., *Bozung v. Local Agency Formation Comm'n*, 13 Cal. 3d 263, 272, 118 Cal. Rptr. 249 (1975) (opposition to environmental effects of annexation — plaintiff lives outside area to be annexed); *Albion River Watershed Protection Ass'n v. Department of Forestry*, 235 Cal. App. 3d 358, 286 Cal. Rptr. 573, 580-88 (1991) (opponents of logging); *Kane v. Redevelopment Agency of Hidden Hills*, 179 Cal. App. 3d 899, 224 Cal. Rptr. 922 (1986) (resident of county interested in slower growth); *Citizens Ass'n for Sensible Dev. v. County of Inyo*, 172 Cal. App. 3d 151, 159, 217 Cal. Rptr. 893 (1985) (geographic nexus with site of challenged project — can be “attenuated”).

from it, regardless of any other interest.¹⁹ However, if the plaintiff cannot establish that he has suffered some kind of harm from the decision in question, he lacks standing to seek review of the decision.²⁰

b. Associational standing

Present law generously allows standing to associations, including unions, trade associations, or political associations, whether or not incorporated. Such associations can sue on behalf of their members. The only requirements are that a member or members could have met the private interest standard had they sued individually, the interests the association seeks to protect are germane to its purpose, and neither the claim asserted nor the relief requested requires the participation of the individual members.²¹ Earlier cases had placed this issue in doubt.²²

19. *Temescal Water Co. v. Department of Pub. Works*, 44 Cal. 2d 90, 107, 279 P.2d 963 (1955); *Covert v. State Bd. of Equalization*, 29 Cal. 2d 125, 130, 173 P.2d 545 (1946) (complainant against licensee who was party to administrative proceeding can seek review of decision denying relief); *Beverly Hills Fed. Sav. & Loan Ass'n v. Superior Court*, 259 Cal. App. 2d 306, 316 n.7, 66 Cal. Rptr. 183 (1968) (bank resisting grant of license to competitor). But see *Madruga v. Borden Co.*, 63 Cal. App. 2d 116, 121, 146 P.2d 273 (1944) (participant in administrative hearing denied right of review — probably explainable because plaintiff had adequate remedy at law).

20. *Parker v. Bowron*, 40 Cal. 2d 344, 254 P.2d 6 (1953) (secretary of union has no standing to challenge city's failure to pay prevailing wages to its employees); *Grant v. Board of Medical Examiners*, 232 Cal. App. 2d 820, 43 Cal. Rptr. 270 (1965) (no standing to challenge agency action favorable to plaintiff despite presence of language in hearing officer's decision derogatory to him); *Silva v. City of Cypress*, 204 Cal. App. 2d 374, 22 Cal. Rptr. 453 (1962) (challenger of zoning variance fails to allege that he was detrimentally affected by the decision).

21. *County of Alameda v. Carleson*, 5 Cal. 3d 730, 737 n.6, 97 Cal. Rptr. 385 (1971) (unincorporated association of welfare recipients has standing to appeal trial court decision invalidating welfare regulations); *Brotherhood of Teamsters v. UIAB*, 190 Cal. App. 3d 1515, 1521-24, 236 Cal. Rptr. 78 (1987) (union can challenge denial of unemployment benefits to its members because of a lockout); *Residents of Beverly Glen, Inc. v. City of Los Angeles*, 34 Cal. App. 3d 117, 109 Cal. Rptr. 724 (1973) (environmental concerns of canyon residents).

22. *Parker v. Bowron*, 40 Cal. 2d 344, 254 P.2d 6 (1953) (union cannot challenge city's failure to pay prevailing wages to its employees whether or not

The ability of associations to sue on behalf of their members is extremely important. Associations often have much greater resources to pursue litigation than do individuals. Moreover, the association is already in place; it need not be organized for purposes of pursuing a particular case, thus limiting transaction costs. Finally, associational standing avoids the free rider problem inherent in individual litigation where a number of people are affected: each such person hopes that others will bear the costs of litigation and therefore nobody does anything (or one individual unfairly has to absorb the costs of litigation that benefit many people).

c. Party status as prerequisite to standing

Must the person seeking judicial review have been a party to the agency proceeding? This issue combines elements of standing and exhaustion of remedies and has caused difficulty. The exhaustion of remedies requirement is that the particular ground on which agency action is claimed to be invalid must have been raised before the agency.²³ The related standing rule is that the particular plaintiff now seeking review of agency action must have objected to the agency action orally or in writing, although not necessary on the grounds that are now the basis for review.²⁴ However, the courts have drawn exceptions to the rule²⁵ and also have not applied it

some employees were members of the union); *Associated Boat Indus. v. Marshall*, 104 Cal. App. 2d 21, 230 P.2d 379 (1951) (trade association is not "interested" in a regulation even though its members are). See *Professional Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal. 2d 276, 283-85, 384 P.2d 158 (1963), which effectively disapproves *Parker*.

23. The "exact issue" rule is discussed under exhaustion of remedies.

24. See *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 267-68, 104 Cal. Rptr. 761 (1972).

25. The *Friends of Mammoth* decision established an exception to the general rule: an association or a class formed after the agency proceeding can sue so long as at least one of its members participated in the agency proceeding. The general rule, and the *Friends of Mammoth* exception, have been codified for California Environmental Quality Act cases in Public Resources Code Section 21177. See *Albion River Watershed Protection Ass'n v. Department of Forestry*, 235 Cal. App. 3d 358, 286 Cal. Rptr. 573, 580-88 (1991), which suggests the problems raised by the *Friends of Mammoth* exception; *Leff v. City of Monterey*

consistently.²⁶ These rather tortured exceptions and inconsistent treatment raise doubts about whether the rule is worth maintaining.

I believe the exhaustion rule is sound but that the standing rule is not.²⁷ The standing rule forces litigants to jump through unnecessary hoops trying to involve as parties to an appeal persons who were active in protesting something before the agency at an earlier time but are not personally interested in securing review of it. So long as the precise issue on which review is now being sought was considered at the agency level, why should it matter whether the particular plaintiff (or someone in the plaintiff's group) was personally involved in raising that or other issues before the agency?²⁸

Park, 218 Cal. App. 3d 682, 267 Cal. Rptr. 343 (1990) (exception applied even though not a class action).

Another exception to the standing rule was established in *Environmental Law Fund, Inc. v. Town of Corte Madera*, 49 Cal. App. 3d 105, 122 Cal. Rptr. 282 (1975). In a case involving public rights, plaintiff was permitted to seek review of a decision by a local planning commission despite having failed to appear at the administrative proceeding. Later cases have limited the *Corte Madera* exception to cases of public as opposed to private right and only where the members of the public failed to receive notice of the proceeding in which they failed to appear. *Resource Defense Fund v. Local Agency Formation Comm'n*, 191 Cal. App. 3d 886, 894-95, 236 Cal. Rptr. 794 (1987); *Mountain View Chamber of Commerce v. City of Mountain View*, 77 Cal. App. 3d 82, 143 Cal. Rptr. 441 (1977).

26. *Peery v. Superior Court*, 29 Cal. 3d 837, 841, 176 Cal. Rptr. 533 (1981); *Employees Serv. Ass'n v. Grady*, 243 Cal. App. 2d 817, 827, 52 Cal. Rptr. 831 (1966); *Brotherhood of Teamsters v. UIAB* 190 Cal. App. 3d 1515, 1521, 236 Cal. Rptr. 78 (1987).

27. The Model Act provides that a petitioner for judicial review of a rule need not have participated in the rulemaking proceeding on which the rule is based. I believe this is the correct resolution of the issue. MSAPA § 5-107(1).

28. A comparable rule requires that a person seeking to appeal a judicial decision have been a party to that case at the trial level. Section 902. However, this has not proved to be a problem, at least in administrative law cases, since persons aggrieved by trial court decisions to which they were not previously parties have been allowed to become parties by moving to vacate the judgment. See *Association of Psychology Providers v. Rank*, 51 Cal. 3d 1, 270 Cal. Rptr. 796 (1990); *County of Alameda v. Carleson*, 5 Cal. 3d 730, 737 n.6, 97 Cal. Rptr. 385 (1971); *Simac Design, Inc. v. Alciati*, 92 Cal. App. 3d 146, 153, 154 Cal. Rptr. 676 (1979). In other cases, parties whose interest appeared on the face of the record were allowed to appeal even though not parties to the trial court deci-

d. Victim standing

A related issue is whether a person who has complained to an agency about a professional licensee should be allowed to challenge an agency decision in favor of the licensee. In some cases, at least, a victim might claim private interest standing on the grounds that the administrative decision will have a bearing on some related litigation (such as a malpractice case). I would deny standing to such a person (unless that person had been made a party at the administrative level). The Commission has already decided in the adjudication phase of its study of administrative law that there should be no right of private prosecution. It would be consistent with that approach to deny standing to seek judicial review to a complainant against a licensee who has not been made a party to the administrative proceeding and who had no right to become a party under a statute specific to the agency.²⁹

e. Local government standing

One confusing group of standing cases concerns the issue of whether a unit of local government can sue the state on the basis that a state statute is unconstitutional. It seems that local government can sue based on the commerce or supremacy clauses but not due process, equal protection, or the contract clause.³⁰ These dis-

sion. *Harris v. Alcoholic Beverage Control Appeals Bd.*, 245 Cal. App. 2d 919, 923, 54 Cal. Rptr. 346 (1966). Consequently, I see no need to recommend modification of Section 902.

29. If the complainant has been made a party to the administrative proceeding, or has a statutory right to become a party, the complainant should have standing to appeal from the decision. *Covert v. State Bd. of Equalization*, 29 Cal. 2d 125, 173 P.2d 545 (1946).

30. See *Star-Kist Foods, Inc. v. County of Los Angeles*, 42 Cal. 3d 1, 227 Cal. Rptr. 391 (1986).

tinctions seem difficult to justify.³¹ Local government should have standing to sue the state.³²

f. Comparison to federal law

The California rules on private interest are blessedly free of the complications that have arisen in federal cases where the courts seem bent on restricting standing as far as possible to limit the caseload of the federal courts and prevent judges from meddling in matters that do not concern them.³³ For example, judicial review under federal law requires not only that the plaintiff have been “injured in fact,” it also requires that the plaintiff be within the “zone of interests” arguably protected or regulated by the statute or constitutional provision in question.³⁴ The courts have found the “zone of interest” test extremely difficult to apply; in my opinion there is no persuasive rationale for it. Even more important, federal courts impose strict requirements of causation and remediability;³⁵ the agency action must have caused the injury to the plaintiff (without the intermediate actions of some third party) and judicial action against the defendant must be likely to remedy that injury. These requirements have been quite strictly applied, yet the tests

31. In general, units of local government have standing to sue the state under the private interest test. See, e.g., *County of Contra Costa v. Social Welfare Bd.*, 199 Cal. App. 2d 468, 18 Cal. Rptr. 573 (1962) (county ordered to pay welfare by state board). There is no apparent reason to treat certain constitutional claims differently for standing purposes.

32. Of course, granting standing is not equivalent to a ruling that the plaintiff has a cause of action. If the constitutional provision in question does not, as a matter of substantive law, protect local government, the suit should be dismissed on the merits, not on the basis of a lack of standing. *Star-Kist Foods, Inc. v. County of Los Angeles*, 42 Cal. 3d 1, 227 Cal. Rptr. 391 (1986).

33. The reader will be grateful that the author considers an extended discussion of the federal standing cases beyond the scope of this study.

34. The U.S. Supreme Court strongly endorsed the zone of interest test in *Air Courier Conference v. American Postal Workers Union*, 111 S. Ct. 913 (1991) (postal employees not within zone of interest of statute giving post office a monopoly).

35. These tests are constitutional, as opposed to prudential rules like the zone of interest test. Congress can alter the zone of interest test, but cannot abolish the causation and remediability tests.

remain unpredictable in practice.³⁶ Again, in my opinion, there is no need for these tests. Unfortunately, the zone of interest test, as well as the causation and remediability tests, were built into the Model Act's standing provision.³⁷ California should not follow the Model Act's lead on this point.

2. Public Actions.

California cases arising under the ordinary mandamus remedy of Section 1085 have been extremely forthcoming in allowing plaintiffs who lack any private injury as described above to sue to vindicate the public interest.³⁸ In a recent California Supreme Court case, for example, plaintiffs were given standing simply in their role as citizens to sue a county for failing to implement state law by not deputizing county employees as voting registrars.³⁹ While some earlier cases cast doubt on the public interest rule,⁴⁰ the newer cases emphatically endorse it.⁴¹

36. See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984).

37. MSAPA § 5-106(a)(5)(ii)-(iii).

38. Since Section 1086 requires that a mandate plaintiff be "beneficially interested," these cases are dramatic examples of judicial lawmaking.

39. *Common Cause v. Board of Supervisors*, 49 Cal. 3d 432, 261 Cal. App. 3d 574 (1989) (plaintiff can seek mandate as well as provisional relief).

40. *Carsten v. Psychology Examining Comm.*, 27 Cal. 3d 793, 166 Cal. App. 3d 844 (1980), refused to allow a member of an agency to obtain judicial review of the actions of that very agency. The case contains language which would undercut the public interest exception. Later cases limit *Carsten* to its facts — for policy reasons, an agency member should not be allowed to sue her own agency. *Green v. Obledo*, 29 Cal. 3d 126, 143-45, 172 Cal. Rptr. 206 (1981). *Parker v. Bowron*, 40 Cal. 2d 344, 254 P.2d 6 (1953), refusing to allow an individual or unions standing to compel a city to comply with a requirement that it pay prevailing wages, also casts doubt on the public interest rule, but must be considered obsolete.

41. See *Green v. Obledo*, 29 Cal. 3d 126, 143-45, 172 Cal. Rptr. 206 (1981) (plaintiff can attack regulation denying welfare benefits including both the portion that denies her benefits and other portions that have no effect on her); *Pitts v. Perluss*, 58 Cal. 2d 824, 829, 27 Cal. Rptr. 19 (1962) (citizen urging enforcement of department's duty to adopt regulations); *Hollman v. Warren*, 32 Cal. 2d 351, 196 P.2d 562 (1948) (constitutionality of statute limiting number of notaries that can be appointed); *Board of Social Welfare v. County of Los Angeles*, 27 Cal. 2d 98, 162 P.2d 627 (1945) (replacement of expired welfare checks);

The rationale for this rule has been stated several times: “[W]here the question is one of public right and the object of mandamus is to procure enforcement of a public duty, the relator need not show he has any legal or special interest in the result since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced.”⁴² Public interest standing “promotes the policy of guaranteeing citizens the opportunity to ensure that no government body impairs or defeats the purpose of legislation establishing a public right.”⁴³

Apparently, this rule applies only to mandate, not to actions for declaratory judgment.⁴⁴ There seems to be little reason for the distinction and a new statute should generalize the public injury test to all actions for judicial review of agency action.

In my view, the public interest rule works well. It has no counterpart on the federal level where a plaintiff must always demonstrate both “palpable” and “particularized” injury in fact.⁴⁵ I

Frank v. Kizer, 213 Cal. App. 3d 926, 261 Cal. Rptr. 882 (1989) (patients have standing to compel compliance with federal Medicaid regulations even though their particular cases have already been settled); American Friends Serv. Comm. v. Proconier, 33 Cal. App. 3d 252, 255-56, 109 Cal. Rptr. 22 (1973) (action to force agency to comply with state rulemaking requirements); Newland v. Kizer, 209 Cal. App. 3d 647, 257 Cal. Rptr. 450 (1989) (action to force agency to adopt regulations); Madera Community Hosp. v. County of Madera, 155 Cal. App. 3d 136, 201 Cal. Rptr. 768 (1984) (same); Environmental Law Fund, Inc. v. Town of Corte Madera, 49 Cal. App. 3d 105, 122 Cal. Rptr. 282 (1975) (environmental group challenging approval of development); McDonald v. Stockton Metro. Transit Dist., 36 Cal. App. 3d 436, 440, 111 Cal. Rptr. 637 (1973) (action to compel city to build bus shelters under its contract with DOT); *In re Veterans' Indus., Inc.*, 8 Cal. App. 3d 902, 88 Cal. Rptr. 303 (1970) (compelling court to exercise cy pres discretion).

42. Board of Social Welfare v. County of Los Angeles, 27 Cal. 2d 98, 101, 162 P.2d 627 (1945).

43. Green v. Obledo, 29 Cal. 3d 126, 144, 172 Cal. Rptr. 206 (1981).

44. Sherwyn v. Department of Social Servs., 173 Cal. App. 3d 52, 218 Cal. Rptr. 778 (1985) (a case decided primarily on ripeness grounds); American Friends Serv. Comm. v. Proconier, 33 Cal. App. 3d 252, 255-56, 109 Cal. Rptr. 22 (1973).

45. See, e.g., Schlesinger v. Reservists' Comm., 418 U.S. 208 (1974) (challenge to practice of members of Congress holding military positions);

believe that plaintiffs who wish to incur the expense and bother of litigating public interest questions, such as the illegality of government action, should be allowed to do so. There is no reason to believe that the existing California public interest rule, or the generous provision for taxpayer suits discussed below, has caused any significant problems by way of harassing agencies or flooding the courts.⁴⁶ Nevertheless, the Commission may wish to consider some limitations on public interest or taxpayer suits, such as a bond requirement⁴⁷ or a requirement that the Attorney General or local law enforcement authority be first notified and given an opportunity to sue before the public interest or taxpayer suit is filed.⁴⁸ I do not recommend either of these measures, absent some empirically based showing that public interest suits are posing a serious problem of harassment or obstruction of public programs.

Aside from the risk of harassment or obstruction, the problem with the public interest rule is definitional. It may be far from self evident whether a particular claim really meets the standards of public right-public duty. So far, at least, this has not proved difficult; the courts have stated that where the public duty is sharp and the public need weighty, a plaintiff needs to show no personal

Sierra Club v. Morton, 405 U.S. 727 (1972) (Sierra Club lacks standing to challenge development program despite its historic commitment to protection of the Sierras).

46. See Carsten v. Psychology Examining Comm., 27 Cal. 3d 793, 805-06, 166 Cal. Rptr. 844 (1980) (dissenting opinion). Justice Richardson's dissent in this 4-3 decision persuasively attacked the majority's rule which precludes a member of an agency from suing her own agency. The dissent thought this was a perfectly appropriate citizen suit and asserted (admittedly without statistical support) that the existing law had caused no problems for government or the courts.

47. In the court's discretion, plaintiff might be compelled to post a bond to cover the defendant's costs. See Comment, *Taxpayers' Suits: Standing Barriers and Pecuniary Restraints*, 59 Temple L.Q. 951, 974-76 (1986). Such a requirement would be akin to that imposed on plaintiffs in stockholder derivative suits. See Corp. Code § 800(c)-(f).

48. Cf. Keith v. Hammel, 29 Cal. App. 131, 154 P. 871 (1915) (taxpayer's action against sheriff should have first been presented to proper county officers to give them a chance to sue).

need; but if the public need is less pointed, courts require plaintiff to show his personal need for relief.⁴⁹ While vague, this test seems serviceable. As discussed below, it is probably not possible to draft anything very specific on this point.⁵⁰

3. Taxpayer Actions

Historically California has been extremely receptive to actions brought by taxpayers to restrain illegal or wasteful expenditures.⁵¹ In 1906, the enactment of Code of Civil Procedure Section 526a formalized the existing case law on the subject. While Section 526a applies only to local government entities, the case law evolution of the remedy has continued so that taxpayer actions can be brought against state officials⁵² or local government entities not mentioned in Section 526a.⁵³

49. McDonald v. Stockton Metro. Transit Dist., 36 Cal. App. 3d 436, 440, 111 Cal. Rptr. 637 (1973).

50. This study does not discuss the recovery of attorney's fees by a successful plaintiff. However, under Section 1021.5, a court may award fees to a successful plaintiff in any action which has resulted in the enforcement of "an important right affecting the public interest if (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any...." If the Commission wanted a definition of public interest standing, it could adapt the test in Section 1021.5(a).

51. See generally Myers, *Standing in Public Interest Litigation: Removing the Procedural Barriers*, 15 Loy. L.A. L. Rev. 1 (1981); Note, *California Taxpayer Suits: Suing State Officers under Section 526a of the Code of Civil Procedure*, 28 Hastings L. Rev. 477 (1976). Non-California discussions of taxpayer actions include Comment, *Taxpayers' Suits: Standing Barriers and Pecuniary Restraints*, 59 Temple L.Q. 951 (1986) (virtually every state allows taxpayer suits against both state and local government); Note, *Taxpayers' Suits: A Survey and Summary*, 69 Yale L.J. 895 (1960).

52. Stanson v. Mott, 17 Cal. 3d 204, 222-23, 130 Cal. Rptr. 697, 708-09 (1976); Ahlgren v. Carr, 209 Cal. App. 2d 248, 25 Cal. Rptr. 887 (1962).

53. Los Altos Property Owners Ass'n v. Hutcheon, 69 Cal. App. 3d 22, 137 Cal. Rptr. 775 (1977) (action against school board can be brought under Section 526a as well as under the common law); Gogerty v. Coachella Valley Jr. College Dist., 57 Cal. 2d 727, 371 P.2d 582 (1962).

The purpose of taxpayer actions is to “enable a large body of the citizenry to challenge governmental action that otherwise would go unchallenged in the courts because of the standing requirement ... California courts have consistently construed Section 526a liberally to achieve this remedial purpose.”⁵⁴

Taxpayer actions can be brought to enjoin expenditures that are contrary to local or state statutes (so called “ultra vires” expenditures) or are contrary to constitutional restrictions. Taxpayers can enjoin programs that involve spending only trivial sums or even non-spending government activities provided that governmental employees are paid a salary to execute them.⁵⁵ A program can be enjoined even if it does not involve the spending of tax dollars or even if it makes money⁵⁶ or even though there are also individuals whose private interest would have allowed them to sue.⁵⁷ Taxpayer actions cannot be defeated by claims that plaintiff is seeking an advisory opinion or that there is no case or controversy.⁵⁸ And actions for declaratory relief or damages are also permitted, even though Section 526a appears limited to injunctions.⁵⁹

54. *Blair v. Pitchess*, 5 Cal. 3d 258, 267-68, 96 Cal. Rptr. 42 (1971). For example, despite the limitation in Section 526a restricting standing to citizen residents of the jurisdiction whose expenditures are being challenged, the courts have allowed nonresident taxpayers to sue. *Irwin v. City of Manhattan Beach*, 65 Cal. 2d 13, 18-20, 51 Cal. Rptr. 881 (1966) (allowing nonresident corporate but not individual taxpayers to sue violates equal protection).

55. *Regents of Univ. of Cal. v. Superior Court*, 3 Cal. 3d 529, 542, 91 Cal. Rptr. 57 (1970) (University’s refusal to employ communists); *Wirin v. Parker*, 48 Cal. 2d 890, 894, 313 P.2d 844 (1957) (use of public funds to conduct illegal police surveillance); *Wirin v. Horrall*, 85 Cal. App. 2d 497, 504, 193 P.2d 470 (1948) (use of funds to conduct police blockades).

56. *Blair v. Pitchess*, 5 Cal. 3d at 267-68.

57. *Van Atta v. Scott*, 27 Cal. 3d 424, 166 Cal. Rptr. 149 (1980).

58. *Blair v. Pitchess*, 5 Cal. 3d at 267-68.

59. *Van Atta v. Scott*, 27 Cal. 3d at 424 (declaratory relief); *Stanson v. Mott*, 17 Cal. 3d 204, 222-23, 130 Cal. Rptr. 697, 708-09 (1976) (damages if defendant failed to exercise due care in illegally spending state funds). See *Keller v. State Bar*, 47 Cal. 3d 1152, 255 Cal. Rptr. 542 (no personal liability of Bar governors for spending Bar funds on election since they reasonably believed the expenditure was authorized).

Less clear is the degree to which “wasteful” expenditures can be enjoined. Section 526a, but not common law taxpayer actions, allow actions restraining governmental waste;⁶⁰ presumably this means spending that cannot achieve any proper governmental purpose even though it is not *ultra vires*. The vagueness of the “waste” concept gives rise to concern.⁶¹

California law relating to taxpayer suits is completely at variance with federal law. Federal cases have rejected taxpayer actions⁶² with the single, somewhat anomalous exception of taxpayer actions to enforce the establishment clause, which are permitted.⁶³

4. *Jus Tertii* — Enforcing Rights of Third Parties.

In some situations, a person (A) would have standing to seek review because of some personal legal or practical harm to its interests. For some reason, however, A does not or cannot actually seek review. Another party (B), who might not meet any of the standing criteria on its own, seeks review on A’s behalf. Suing to enforce the rights of third parties is often referred to as *jus tertii*. California cases, like federal cases, make provision for *jus tertii* in appropriate cases.⁶⁴

60. Los Altos Property Owners Ass’n v. Hutcheon, 69 Cal. App. 3d 22, 137 Cal. Rptr. 775 (1977).

61. Harnett v. County of Sacramento, 195 Cal. 676, 683, 235 P. 45 (1925) (court can enjoin a redistricting election which could not achieve desired result); Los Altos Property Owners Ass’n v. Hutcheon, 69 Cal. App. 3d 22, 137 Cal. Rptr. 775 (1977) (claim that school board’s consolidation plan would cost more than plaintiff taxpayer’s alternative plan states cause of action for waste); City of Ceres v. City of Modesto, 274 Cal. App. 2d 545, 555-56, 79 Cal. Rptr. 168 (1969) (installation of sewer lines — wasteful, improvident, and completely unnecessary public spending can be enjoined by a taxpayer even though done in exercise of lawful power).

62. Valley Forge Christian Sch. v. Americans United, 454 U.S. 464 (1982).

63. Flast v. Cohen, 392 U.S. 83 (1968).

64. *Jus tertii* is not automatic, however. For example, B was not allowed to sue on A’s behalf where B and A had conflicting interests. Camp Meeker Sys., Inc. v. PUC, 51 Cal. 3d 845, 274 Cal. Rptr. 678 (1990). And in a case primarily decided on ripeness grounds, attorneys were denied standing to sue on behalf of clients who wished to enter into surrogate parenting arrangements to challenge

Two factors have been employed in deciding whether *B* can sue. First, what is the relationship between *B* and *A*? *B* is likely to have standing if *A*'s rights are inextricably bound up with an activity that *B* wishes to pursue. Second, is there some practical obstacle to *A* seeking review itself?⁶⁵

In the California cases that have permitted suit under the *jus tertii* approach, both factors pointed in the direction of permitting standing. For example, in *Selinger v. City Council of Redlands*,⁶⁶ a state statute required automatic approval of a subdivision application if not denied within one year. Arguably this statute denied due process to adjacent landowners who normally would be entitled to notice and a hearing on the application. But the adjacent landowners were not notified and the subdivision was automatically approved after one year. A city was permitted to sue on behalf of the landowners. The statute interfered with the city's zoning pro-

policies of a state agency. *Sherwyn v. Department of Social Servs.*, 173 Cal. App. 3d 52, 218 Cal. Rptr. 778 (1985).

In the venerable case of *Parker v. Bowron*, 40 Cal. 2d 344, 254 P.2d 6 (1953), the question was whether a city was complying with a prevailing wage law; neither unions (that contained some city workers) nor the secretary of those unions was permitted to assert the rights of city employees. The *Parker* case has clearly been superseded by later cases involving the right of associations to vindicate the rights of their members. See *supra* text accompanying notes 21-22. *Parker* might still be followed, however, on the question of whether the secretary of the union could assert the rights of city workers; however, it is likely that the suit could proceed as a public action under modern cases. The prevailing wage law might be considered as one that created public rights and duties.

65. This analysis was drawn from federal cases. For example, a physician is permitted to sue on behalf of patients who assert that a state statute denies the patient's right to obtain an abortion; a vendor is permitted to assert the rights of buyers penalized by an unconstitutional statute. *Singleton v. Wulff*, 428 U.S. 106 (1976); *Craig v. Boren*, 429 U.S. 190 (1976). See generally L. Tribe, *American Constitutional Law* § 3-19 (2d ed. 1988).

66. 216 Cal. App. 3d 271, 264 Cal. Rptr. 499 (1989). Similarly, see *Drum v. Fresno County Dep't of Pub. Works*, 144 Cal. App. 3d 777, 783-84, 192 Cal. Rptr. 782 (1983). See also the leading California case of *Board of Social Welfare v. County of Los Angeles*, 27 Cal. 2d 98, 100, 162 P.2d 627 (1945), allowing a state social welfare agency to sue a county on behalf of welfare recipients "who are ... ordinarily financially, and often physically, unable to maintain such proceedings on their own behalf."

cess (although it did not deprive the city of due process); therefore the first criterion of inextricable relationship was met. Secondly, the landowners would have difficulty bringing the suit since they were never notified of the development until it was too late to challenge it.

There may be cases in which *B* cannot meet these tests. In many such cases, however, *B* could probably sue under the public rights approach discussed above where the courts require no personal stake at all.

B. RECOMMENDATIONS

A statute should codify standing law, which is now mostly in relatively inaccessible and somewhat confusing case law and fragmentary and misleading statutes.⁶⁷ I suggest working with the provision in the Model Act⁶⁸ but adding provisions on public actions and pruning the parts of the statute that incorporate inappropriate and unsatisfactory federal standing rules.

1. Private Interest.

The MSAPA section provides standing to a person to whom the agency action is specifically directed and to a person who was a party to the agency proceedings that led to the agency action. It also provides standing to “a person eligible for standing under another provision of law.”⁶⁹ These subsections seem appropriate and reflect existing California law.

The MSAPA provides that “if the challenged agency action is a rule, a person subject to that rule” has standing to seek review of the rule.⁷⁰ This would change existing California law that, with some exceptions, requires a person challenging a rule to have been

67. For example, Section 526a, relating to taxpayer actions, appears to cover only actions against local government, yet it has been expanded to cover actions against the state.

68. MSAPA § 5-106.

69. *Id.* § 5-106(a)(1), (2), (4).

70. *Id.* § 5-106(a)(3).

a party to the rulemaking proceeding.⁷¹ As discussed above, I believe that the existing rule is unnecessary. The related exhaustion of remedies rule requiring that the particular issue that is the subject of the challenge be raised at the administrative level makes sense, but there is little reason to require that the particular plaintiff have been involved in the rulemaking proceeding.

The MSAPA then provides that “a person otherwise aggrieved or adversely affected by the agency action” has standing to challenge it. “For purposes of this paragraph, no person has standing as one otherwise aggrieved or adversely affected unless: (i) the agency action has prejudiced or is likely to prejudice that person....”⁷² This adequately states the “private interest” standard, which is well developed in existing California law.⁷³ The MSAPA then goes on to add the zone of interests, causation, and remediability requirements of federal law,⁷⁴ which I strongly urge that California not adopt.⁷⁵

The statute should make clear that it preserves existing law about the right of associations to sue on behalf of any of their members who can meet the private interest standard.⁷⁶ This idea should be expressed in statutory language.

The statute should also preserve the *jus tertii* rule — the right of third parties to assert the rights of persons who meet the private interest standard.⁷⁷ Here the standard is so vague that it might be

71. See *supra* text accompanying notes 24-28.

72. MSAPA § 5-106(a)(5).

73. Note again that the MSAPA does not require that the person have been a party to the action below, whether it is quasi-legislative or quasi-judicial. I believe this change is appropriate.

74. MSAPA § 5-106(a)(5)(ii), (iii).

75. Probably the section can be simplified by leaving out the language about “otherwise aggrieved or adversely affected,” leaving only a residual section on private interest for agency action that “prejudiced or is likely to prejudice” the plaintiff. This seems adequate to capture any sort of practical or legal harm and thus meets the California standards that the plaintiff be hurt in some way that distinguishes him from the general public.

76. See *supra* text accompanying notes 21-22.

77. See *supra* text accompanying notes 64-66.

difficult to write a statute on it. Perhaps the *jus tertii* rule can be the subject of a comment to the section stating that prior law is preserved, together with a few citations to existing cases that articulate that law. Finally, the statute or a comment should make clear the local government has standing to sue the state on any legal theory.⁷⁸

2. Public Interest and Taxpayer Suits

Because it seems to be based on federal law, the MSAPA standing provision does not allow standing to taxpayers or to persons asserting public interest claims. I believe California law on these points is working well and should be preserved.

However, it seems to me that taxpayer actions should be dispensed with. If there is a generous public interest type standard, what is the need for the separate taxpayer action? The case law has expanded taxpayer actions to the point that their conceptual basis (arising out of harm to the long-suffering taxpayer) seems rather silly. As we have seen, a taxpayer can seek to enjoin any action by government whether it involves spending funds or not, or even if the activity is a money-maker. Any action that involves paid staff to implement falls within the domain of taxpayer standing — and obviously this includes every possible action by government. Who cares, at this point, whether the plaintiff is a taxpayer or not?

Besides, some aspects of taxpayer standing under existing law seem dubious. I do not believe that there should be an action for “waste” of taxpayer funds; if there is no basis for claiming illegality of the action or expenditure, the courts should not intervene. An action for “waste” provides too great an inducement for harassing lawsuits that raise essentially political issues. Moreover, I do not believe that there should be personal liability of government officials for administrative action that proves to be invalid, whether or not such action meets the due care standard developed in existing

78. See *supra* text accompanying notes 30-32.

law.⁷⁹ Such liability runs contrary to the policies behind the tort claims act.⁸⁰

Instead, it seems sensible to fold the taxpayer action into a generic public interest standard.⁸¹ Such a standard would allow a plaintiff to challenge action of state or local government on the ground that such action is contrary to law. Such law could be expressed in the state or federal constitution, a statute, a regulation, or even in judicial decisions. However, the law in question must be one that a court believes was intended to benefit the general public or a large segment of the general public, as opposed to a narrow private interest. The law might, for example, be one that imposes environmental controls or controls on the political process. It might be a tax law that is being erroneously interpreted to create a loophole. It might be a benefit statute intended to relieve poverty. The bounds of the public interest statute cannot be expressed by any statutory formula and must evolve case by case. I leave it to the staff to figure out exactly how such a provision should be drafted.⁸² Perhaps a comment stating that the Legislature approves of existing law (illustrated by a few citations) would be sufficient.

II. TIMING OF JUDICIAL REVIEW

Various doctrines control the timing of judicial review; if applicable, these doctrines require a delay of judicial involvement in resolving the dispute. At present, none of the doctrines are statutory and several overlap. In many respects, the case law is confusing and inconsistent. Codification and clarification of these doctrines and their various exceptions would be helpful.

79. See *supra* note 59.

80. See California Government Liability Tort Practice §§ 2.89-2.91, at 170-73, §§ 6.143-6.156, at 863-79 (Cal. Cont. Ed. Bar, 3d ed. 1992). In general, in all but very unusual cases, a public entity must provide a defense for public employees and must indemnify such employees against any liability for job-related acts. Thus the Legislature is committed to a regime in which public employees are not subject to personal liability.

81. Taxpayer suits have functionally become citizen suits. Note, 69 Yale L.J. 895, 906 (1960).

82. See *supra* note 50, suggesting use of language in Section 1021.5.

A. EXHAUSTION OF ADMINISTRATIVE REMEDIES

1. Existing California Law

The requirement that a party exhaust administrative remedies before seeking judicial review has been heavily litigated in California.⁸³

Unless an exception to the rule is applicable, a litigant must fully complete all federal,⁸⁴ state and local administrative remedies before coming to court or defending against administrative enforcement.⁸⁵ The doctrine applies even though a litigant contends that an agency has made a legal error, for example by wrongfully taking jurisdiction over the case or by denying benefits to the litigant or by failing to follow its own procedural rules.⁸⁶

The exhaustion rule applies whenever a process exists whereby an unfavorable agency decision might be challenged within that agency or another agency.⁸⁷ The rule applies to the review of state or local agency actions that might be deemed quasi-legislative,

83. For general treatments of exhaustion under California law, see Comment, *Exhaustion of Administrative Remedies in California*, 56 Cal. L. Rev. 1061 (1968); California Administrative Mandamus ch. 2 (Cal. Cont. Ed. Bar, 2d ed. 1989); 3 B. Witkin, *California Procedure Actions* §§ 308-23, at 392-415 (4th ed. 1996); 2 G. Ogden, *California Public Agency Practice* § 51.02 (1992).

This section of the study does not consider the rule that a failure to exhaust *judicial* remedies under Section 1094.5 establishes the propriety of the administrative action under the doctrine of administrative *res judicata*. See, e.g., *Knickerbocker v. City of Stockton*, 199 Cal. App. 3d 235, 244 Cal. Rptr. 764 (1988). This section concerns only exhaustion of administrative remedies.

84. *Acme Fill Corp. v. San Francisco Bay Cons. & Dev. Comm'n*, 187 Cal. App. 3d 1056, 1064, 232 Cal. Rptr. 348 (1986) (exhaustion of federal remedy before suing in state court).

85. *South Coast Regional Comm'n v. Gordon*, 18 Cal. 3d 832, 135 Cal. Rptr. 781 (1977) (failure to exhaust remedies precludes raising defenses against enforcement); *People v. Coit Ranch, Inc.*, 204 Cal. App. 2d 52, 57-58, 21 Cal. Rptr. 875 (1962) (same).

86. *Bollengier v. Doctors Medical Ctr.*, 222 Cal. App. 3d 1115, 1126-32, 272 Cal. Rptr. 273 (1990).

87. However, that process must be one provided by regulation or statute that furnishes clearly defined machinery for submission, evaluation, and resolution of the dispute. See *infra* text accompanying note 116.

quasi-administrative or ministerial, as well as quasi-judicial.⁸⁸ It requires not only that every procedural avenue be completely exhausted,⁸⁹ but also that the exact issue that the litigant wants the court to consider have been raised before the agency.⁹⁰ It applies even though the administrative remedy is no longer available; in such cases, of course, dismissal because of a failure to exhaust is equivalent to denying judicial review altogether.

In California, unlike federal law, there is no separate “final order” rule.⁹¹ If the decision being challenged is not final, the court

88. *Redevelopment Agency of the County of Riverside v. Superior Court*, 228 Cal. App. 3d 1487, 1492, 279 Cal. Rptr. 558 (1991) (whether adoption of redevelopment plan is quasi-legislative or quasi-administrative, exhaustion rule applies); *Lopez v. Civil Serv. Comm’n*, 232 Cal. App. 3d 312, 283 Cal. Rptr. 447 (1991) (exhaustion applies to all forms of mandate and applies even though plaintiff seeks ministerial rather than quasi-judicial action by agency).

But see *City of Coachella v. Riverside County Airport Land Use Comm’n*, 210 Cal. App. 3d 1277, 1287-88, 258 Cal. Rptr. 795 (1989), involving objections to a land use plan adopted by a local agency. The objector failed to appear at a legally required public hearing. The court held that appearance at the hearing was not a remedy that must be exhausted, since the agency was not required to do anything in response to submissions at the hearing. I regard the latter decision as probably incorrect; the public hearing was obviously intended for the purpose of allowing the public to raise questions about the planning decision and for the agency to consider and respond to such questions.

89. *Lopez v. Civil Serv. Comm’n*, 232 Cal. App. 3d 312, 283 Cal. Rptr. 447 (1991) (must raise issue at every stage of the administrative process); *Edgren v. Regents of Univ. of Cal.*, 158 Cal. App. 3d 515, 205 Cal. Rptr. 6 (1984) (litigant who withdrew during a hearing, complaining of due process violations in the way the hearing was being conducted, failed to exhaust remedies).

There appears to be an exception to the requirement that the objection be raised at every possible stage in the case of land use planning; it is sufficient to raise an objection before the “lead agency” but not before the planning commission. *Browning-Ferris Ind. v. San Jose City Council*, 181 Cal. App. 3d 860, 226 Cal. Rptr. 575 (1986).

90. The exact issue rule is discussed *infra* in text accompanying notes 100-03.

91. Section 1094.5 provides for review of any “final administrative order or decision” arising out of a hearing. Most decisions have dismissed applications for mandamus to review non-final orders because of a failure to exhaust remedies (as distinguished from a separate final order rule). Some cases have treated finality as a distinct reason to dismiss applications under Section 1094.5. *Kumar v. National Medical Enters.*, 218 Cal. App. 3d 1050, 267 Cal. Rptr. 452 (1990)

will dismiss under the exhaustion of remedies rule, unless an exception to the exhaustion doctrine applies.⁹² I have not suggested any change in this practice since the analysis of whether a decision is a “final order” and whether a litigant has “exhausted administrative remedies” are so similar. It would probably create more confusion than clarity to try to separate them.

a. Purposes and costs of the exhaustion doctrine

The purposes of the exhaustion requirement have often been spelled out.⁹³ Essentially, there are two rationales for the exhaustion rule.

The first rationale for exhaustion arises out of a pragmatic concern for judicial efficiency. Judicial proceedings are more efficient if piecemeal review can be avoided. The quality of review is enhanced if a court can start with a complete factual record produced at the agency level. Moreover, it is helpful to a court if an expert agency has resolved the same issue that the court must deal with. Finally, a litigant may succeed before the agency or the case may be settled; thus the court can avoid ever having to decide the case at all.

The second purpose of exhaustion is based on separation of powers; the agencies of state and local government are a separate branch of government and their autonomy must be respected. This purpose is furthered by allowing an agency to apply its expertise to the problem and to correct its own mistakes before it is haled into court. Moreover, if exhaustion were not required, litigants would have an incentive to short-circuit agency processes and avoid an agency decision to which a court would give deference. Such end

(only final order from appellate body of hospital can be appealed under Section 1094.5); *Board of Medical Quality Assurance v. Superior Court*, 73 Cal. App. 3d 860, 141 Cal. Rptr. 83 (1977) (Section 1094.5 action filed for purpose of taking deposition in a pending administrative action dismissed because of the lack of a final order).

92. *Bollengier v. Doctors Medical Ctr.*, 222 Cal. App. 3d 1115, 1125, 272 Cal. Rptr. 273 (1990).

93. See, e.g., *McCarthy v. Madigan*, 112 S. Ct. 1081, 1086-87 (1992); *Rojo v. Klieger*, 52 Cal. 3d 65, 82-85, 276 Cal. Rptr. 130 (1990).

runs are contrary to the Legislature's intention in creating those agencies.

While the exhaustion doctrine serves valuable public purposes, the requirement can be very costly to litigants. The exhaustion doctrine requires them to resort to agency remedies they believe are almost certainly useless. Where a private litigant ultimately prevails in court, but has first been required to exhaust administrative remedies, the effect of the doctrine is to delay ultimate resolution of the case, perhaps for years. It also requires the expenditure of substantial, perhaps crushing, professional fees. Indeed, exhaustion of remedies often means exhaustion of litigants. In many cases, the remedy in question is no longer available by the time the case comes to court; in such cases, requiring exhaustion means that the case is over and the private litigant has lost.

b. Doctrine is jurisdictional

One notable aspect of the California exhaustion rule is that it is jurisdictional, not discretionary. At the federal level and in most states, exhaustion of remedies is discretionary unless a specific statute requires exhaustion, in which case it is treated as jurisdictional.⁹⁴

The rule that exhaustion is jurisdictional derives from the leading California case, *Abelleira v. District Court of Appeal*.⁹⁵ In *Abelleira*, an administrative judge held that employees were entitled to unemployment benefits despite a statutory rule precluding payment of benefits in cases where unemployment was caused by a strike. The employer appealed to higher agency authority. While that appeal was pending, the employer sought judicial review of the ALJ's decision. The employer argued that immediate review should be available, notwithstanding its failure to exhaust remedies, because the statute required payment of benefits to the employees pending the administrative appeal. The employer claimed that such immediate and unlawful payments would deplete the benefit fund. The court of appeal held that immediate judicial

94. See *McCarthy v. Madigan*, 112 S. Ct. 1081 (1992).

95. 17 Cal. 2d 280, 102 P.2d 329 (1941).

review was available.⁹⁶ An employee sought a writ of prohibition in the California Supreme Court.

The Court granted the writ. In order to do so, it had to label the exhaustion requirement as jurisdictional since prohibition would not lie to correct an abuse of discretion by the lower court. Its sweeping opinion emphatically endorsed the exhaustion doctrine, and its peremptory rejection of possible exceptions committed California courts to a policy of relatively rigid enforcement of the doctrine.

Since *Abelleira*, both the Supreme Court and lower courts have often countenanced exceptions to the exhaustion requirement. However, the rule that exhaustion is jurisdictional constrains the ability of lower courts to recognize new exceptions or broaden the existing ones or to excuse a lack of exhaustion based on a balancing of factors.⁹⁷ In contrast, federal cases often excuse exhaustion

96. A federal court would not have treated *Abelleira* as an exhaustion case but as a final order case. In *Abelleira*, the employer was protesting against the immediate payment of benefits to the employee which occurred after the initial decision. Insofar as preventing that payment was concerned, the employer had exhausted its remedy when it lost at the initial hearing. The appeal to the agency heads was not a remedy that could have prevented immediate payment of benefits.

However, the order in question was not final and would not be final until the agency heads had acted on the employer's appeal. See *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980) (litigant had exhausted remedy with respect to particular issue but still could not appeal a non-final order). *Abelleira* would have been a weak case for an exception to the final order rule. The employer was not seriously harmed by the immediate payment of benefits since its reserve account would be credited if it were ultimately successful in the case. On the other hand, the unemployed workers obviously needed their payments immediately, not at the end of protracted litigation.

California law has no separate final order rule for administrative action. As in *Abelleira*, the exhaustion doctrine is used to preclude appeals of non-final orders.

97. A few California cases use a flexible, balancing analysis to decide whether to excuse a failure to exhaust remedies. See *Doster v. County of San Diego*, 203 Cal. App. 3d 257, 251 Cal. Rptr. 507 (1988); *Hull v. Cason*, 114 Cal. App. 3d 344, 359, 171 Cal. Rptr. 14 (1981) (public interest demands court take case which had already been litigated for several years despite failure to exhaust remedies); *Hollon v. Pierce*, 257 Cal. App. 2d 468, 64 Cal. Rptr. 808 (1964);

by determining whether the purposes of the exhaustion rule would be frustrated if an exception were to be allowed in the particular case in light of the costs that exhaustion would impose on the particular litigant.

In addition, according to some cases, the rule that exhaustion is jurisdictional means that the exhaustion objection cannot be waived by agreement⁹⁸ or by failure to make the objection at the appropriate time; instead, it can be initially raised at any time, even on appeal.⁹⁹

c. The "exact issue" rule

One important corollary to the exhaustion of remedies rule requires that the exact issue to be considered by a reviewing court have been presented to the agency during the course of its consideration of the matter.¹⁰⁰ Thus a person can be precluded from rais-

Greenblatt v. Munro, 161 Cal. App. 2d 596, 605-07, 326 P.2d 929 (1958). This approach is probably contrary to *Abelleira*.

98. Noonan v. Green, 276 Cal. App. 2d 25, 80 Cal. Rptr. 513 (1969); Buchwald v. Superior Court, 254 Cal. App. 2d 347, 359-60, 62 Cal. Rptr. 364 (1967).

99. Hittle v. Santa Barbara County Employees Retirement Ass'n, 39 Cal. 3d 374, 384, 216 Cal. Rptr. 733 (1985); People v. Coit Ranch, Inc., 204 Cal. App. 2d 52, 57, 21 Cal. Rptr. 875 (1962). This rule is in some doubt, however. See Green v. City of Oceanside, 194 Cal. App. 3d 212, 219-23, 239 Cal. Rptr. 470 (1987), rejecting an exhaustion defense raised for the first time on appeal. The court pointed out persuasively that it would be grossly unfair for defendant to ignore this procedural defense and put plaintiff to expense of trial, knowing it could assert the exhaustion defense on appeal if it lost at trial.

100. See, e.g., Resource Defense Fund v. Local Agency Formation Comm'n, 191 Cal. App. 3d 886, 894, 236 Cal. Rptr. 794, 798 (1987); Coalition for Student Action v. City of Fullerton, 153 Cal. App. 3d 1194, 200 Cal. Rptr. 855 (1984). CEB calls this doctrine the requirement of preserving issues at the administrative hearing. California Administrative Mandamus §§ 2.2-2.24, at 36-48 (Cal. Cont. Ed. Bar, 2d ed. 1989). The exact issue rule has been codified in cases brought under the California Environmental Quality Act. Pub. Res. Code § 21177(a).

The exact issue rule is often quite strictly applied. Thus specific environmental objections to a timber harvesting plan were not raised before the agency by preprinted form objections raising various environmental and political concerns because these related to logging generally without being specific to the project under review. Albion River Watershed Protection Ass'n v. Department of Forestry, 235 Cal. App. 3d 358, 286 Cal. Rptr. 573, 580-88 (1991). But see Citizens Ass'n for Sensible Dev. v. County of Inyo, 172 Cal. App. 3d 151, 163,

ing a particular issue or defense, even though every possible administrative remedy was exhausted, because the particular issue was not pressed before the agency.¹⁰¹ It appears, however, that unlike the exhaustion doctrine, the exact issue doctrine is not jurisdictional;¹⁰² therefore, it probably can be waived by the agency. Apparently the same exceptions that apply to the general exhaustion rule also apply to the exact issue rule.

The exact issue rule makes good sense. In judicial efficiency terms, it is important that the issue be raised below so that a complete record can be created at the agency level and so that the agency can apply its expert judgment to that issue. Particularly in local land use planning, the issues often concern complex urban planning, timber management, and environmental policy problems. Thus preliminary consideration by the agency is very helpful to reviewing courts. In separation of powers terms, it is appropriate that courts require the presentation of issues to agencies; otherwise litigants would be encouraged to sidestep preliminary agency consideration, to which a court ordinarily owes considerable deference, in the hope of getting a better shake from the court reviewing the issue *de novo*.¹⁰³

d. Exceptions to exhaustion

The exceptions to the exhaustion doctrine have been heavily litigated. These exceptions can be grouped under two broad headings: inadequacy of the remedy and irreparable injury. Under inade-

217 Cal. Rptr. 893 (1985) (less specificity required to preserve issue in administrative than in judicial proceeding since parties often not represented by counsel).

101. Indeed, a mere perfunctory or "skeleton" presentation is insufficient if it is seen as a ruse for transferring the issue from the agency to the court. See *Dare v. Board of Medical Examiners*, 21 Cal. 2d 790, 799, 136 P.2d 304 (1943); *City of Walnut Creek v. County of Contra Costa*, 101 Cal. App. 3d 1012, 162 Cal. Rptr. 224 (1980).

102. See *Greenblatt v. Munro*, 161 Cal. App. 2d 596, 605-07, 326 P.2d 929 (1958).

103. *City of Walnut Creek v. County of Contra Costa*, 101 Cal. App. 3d 1012, 162 Cal. Rptr. 224 (1980).

quacy of the remedy fall the accepted exceptions for futility, inadequate remedy, certain constitutional issues, and lack of notice.¹⁰⁴

i. Futility.

If it is positively clear that the agency will not grant the requested relief, the remedy would be considered inadequate because it is futile.¹⁰⁵ However, the exhaustion requirement is not excused merely because favorable agency action is unlikely. If courts excused exhaustion merely because favorable agency action is unlikely, the exhaustion requirement would practically disappear, since litigants usually go to court prematurely only when they feel there is little chance that they will prevail at the agency level.¹⁰⁶ Moreover, the exception is not applicable even though the remedy is no longer available at the time a litigant seeks judicial review, unless the litigant can establish positively that the remedy would have been useless if it had been availed of.¹⁰⁷

The futility exception is based upon a balance of the purposes of the exhaustion rule against the costs of enforcing it. Forcing a litigant to pursue the remedy serves judicial efficiency and recognizes the agency's role under the separation of powers. Yet it becomes difficult to justify imposing the costs of exhaustion on a litigant when it is certain that those costs will be wasted. Therefore, litigants must pursue probably unavailing remedies but need not pursue certainly unavailing ones.

104. The exception for local tax assessments alleged to be a nullity is anomalous. In addition, the existing APA contains a questionable exception for denial of continuances. See *infra* text accompanying note 142. The California Supreme Court also decided to hear a case despite a failure to raise the exact issue where public policy required that the issue be immediately resolved. *Lindeleaf v. Agricultural Labor Relations Bd.*, 41 Cal. 3d 861, 870-71, 226 Cal. Rptr. 119 (1986).

105. *Ogo Assocs. v. City of Torrance*, 37 Cal. App. 3d 830, 112 Cal. Rptr. 761 (1974).

106. *Doyle v. City of Chino*, 117 Cal. App. 3d 673, 683, 172 Cal. Rptr. 844 (1981).

107. *George Arakelian Farms v. Agricultural Labor Relations Bd.*, 40 Cal. 3d 654, 662-63, 221 Cal. Rptr. 488, 493 (1985) (failure to make timely request for agency review precludes judicial review — inadequate showing that review would be futile).

In the leading case on the futility exception, a developer was excused from applying for a variance from a zoning scheme when that scheme was enacted for the purpose of blocking the very project the developer wanted to build.¹⁰⁸ Similarly, if agency memoranda¹⁰⁹ or a prior decision involving the same litigant¹¹⁰ indicate that the decision in the particular case is absolutely certain to go against the litigant, he need not exhaust remedies. However, the fact that an agency has previously decided a string of cases on the same legal issue in a way adverse to the litigant's position is not sufficient;¹¹¹ the agency might be willing to distinguish its prior cases.¹¹²

108. *Ogo Assocs. v. City of Torrance*, 37 Cal. App. 3d 830, 112 Cal. Rptr. 761 (1974).

109. *Truta v. Avis Rent a Car Systems, Inc.*, 193 Cal. App. 3d 802, 812, 238 Cal. Rptr. 806, 811 (1987); *In re Thompson*, 52 Cal. App. 3d 780, 125 Cal. Rptr. 261, 263 (1975).

110. *Elevator Operators Union v. Newman*, 30 Cal. 2d 799, 811, 186 P.2d 1, 7 (1947) (discharge of employee — union board had already rejected appeal from discharge decision and would certainly reject a damage claim based on same discharge); *Breaux v. Agricultural Labor Relations Bd.*, 217 Cal. App. 2d 730, 743, 265 Cal. Rptr. 904, 910 (1990) (futile to question settlement before agency that had already approved it).

111. *Gantner & Mattern Co. v. California Employment Comm'n*, 17 Cal. 2d 314, 317, 104 P.2d 932, 934 (1947); *Westinghouse Elec. Corp. v. County of Los Angeles*, 42 Cal. App. 3d 32, 39-40, 116 Cal. Rptr. 742, 747 (1974); *City of Los Angeles v. California Towel & Linen Supply*, 217 Cal. App. 2d 410, 420, 31 Cal. Rptr. 832 (1963); *Virtue Bros. v. County of Los Angeles*, 239 Cal. App. 2d 220, 232, 48 Cal. Rptr. 505 (1966).

112. See *Yamaha Motor Corp. U.S.A. v. Superior Court*, 185 Cal. App. 3d 1232, 1242, 230 Cal. Rptr. 382, 387 (1986). This case concerned the breach of a franchise agreement by refusing to supply a dealer with a new product line offered to other dealers. The New Motor Vehicle Board had decided a case involving the identical product line but a different dealer. The court required exhaustion since the Board might distinguish the prior case for reasons specific to this particular dealer, like the size of the dealership and financial impact.

Similarly, the fact that the agency previously decided other issues in the same case in a way contrary to the plaintiff's position does not mean that it would not fairly consider the issues currently presented. *Sea & Sage Audubon Soc'y, Inc. v. Planning Comm'n*, 34 Cal. 3d 412, 418-19, 194 Cal. Rptr. 357 (1983).

Some cases have stretched the futility doctrine. They have excused a failure to exhaust where the agency's initial response seemed hostile and unyielding,¹¹³ where the agency disclaimed jurisdiction,¹¹⁴ or where it seemed unlikely the decisionmaker would change his mind.¹¹⁵ It would seem that the more flexible futility test in these cases runs afoul of the stern *Abelleira* rule that exhaustion is jurisdictional, not a matter of judicial discretion.

ii. Inadequate remedies.

In addition to cases in which the administrative remedy is considered futile, remedies can be considered inadequate for other reasons and thus need not be exhausted. Thus a procedure that provides no clearly defined machinery for the submission, evaluation, and resolution of complaints is inadequate.¹¹⁶ One rather problematic application of this doctrine occurs where the subject matter

113. *Grier v. Kizer*, 219 Cal. App. 3d 422, 432, 268 Cal. Rptr. 244, 249 (1990) (unyielding position that regulation was validly adopted); *Jacobs v. State Bd. of Optometry*, 81 Cal. App. 3d 1022, 1030, 147 Cal. Rptr. 225, 229 (1978) (dismissive reply to inquiry); *Police Officers Ass'n v. Huntington Beach*, 58 Cal. App. 3d 492, 498-99, 126 Cal. Rptr. 893, 897-98 (1976) (hostile response to grievance plus position in lower court); *In re Faucette*, 253 Cal. App. 2d 338, 343, 61 Cal. Rptr. 97, 99 (1967) (failure to fully consider initial application means further administrative recourse is futile).

114. *Department of Personnel Admin. v. Superior Court*, 5 Cal. App. 4th 155, 6 Cal. Rptr. 2d 714, 721-22 (1992).

115. *Doster v. County of San Diego*, 203 Cal. App. 3d 257, 261-62, 257 Cal. Rptr. 507, 509-10 (1988). This case employs a flexible balancing analysis in order to decide whether to excuse a deputy sheriff's failure to request a hearing within the five-day time period allowed by local ordinance. One factor in favor of excusing it was that a factual record compiled at an earlier hearing already existed. Considering the unlikelihood that the sheriff would change his mind and the existence of a factual record, the court decided that it should reach the narrow legal question involved.

116. *Common Cause v. Board of Supervisors*, 49 Cal. 3d 432, 443, 261 Cal. Rptr. 574 (1989) (plaintiff not required to petition Secretary of State to adopt regulations); *Endler v. Schutzbank*, 68 Cal. 2d 162, 168, 65 Cal. Rptr. 297 (1968) (where agency retained discretion to ignore decision, procedure was inadequate — heads-I-win-tails-you-lose); *Rosenfield v. Malcolm*, 65 Cal. 2d 559, 55 Cal. Rptr. 595 (1967) (remedy of instituting an investigation not adequate to deal with plaintiff's claim of illegal discharge).

of the controversy lies outside the agency's jurisdiction.¹¹⁷ This subject matter rule applies to cases in which the jurisdictional error appears clearly and positively on the face of the pleadings and does not depend on any disputed factual matters.¹¹⁸ Unless cautiously applied, this exception could be broadened to cover any alleged agency error of law.

Similarly, a remedy might be inadequate because of a lack of minimally adequate notice¹¹⁹ or other necessary procedure.¹²⁰ If the procedure in question cannot furnish any of the relief sought by plaintiff, or an acceptable substitute for that relief, it is not adequate.¹²¹ If agency action has ground to a halt or the agency is

117. *County of Contra Costa v. State*, 177 Cal. App. 3d 62, 73, 222 Cal. Rptr. 750, 758 (1986) (dictum). The problem of an agency lacking subject matter jurisdiction is more likely to arise in a primary jurisdiction case. See *County of Alpine v. County of Tuolumne*, 49 Cal. 2d 787, 322 P.2d 449 (1958).

This rule was misapplied in *Richman v. Santa Monica Rent Control Bd.*, 7 Cal. App. 4th 1457, 9 Cal. Rptr. 2d 690, 693 (1992), to excuse a litigant's failure to comply with the exact issue rule by failing to raise a question of law before the agency. The court thought that the agency had no jurisdiction to deal with a question of law since this was a matter for the courts. While the courts may have power to independently decide a question of law, it does not at all follow that an agency lacks jurisdiction to make the initial call on such a question. Consequently, it is inappropriate to excuse a failure to raise the issue before the agency.

118. See, under federal law, *Leedom v. Kyne*, 358 U.S. 184 (1958) (agency lacked jurisdiction to order inclusion of non-professionals in bargaining unit of professionals — error apparent on face of pleadings).

119. *Horn v. County of Ventura*, 24 Cal. 3d 605, 156 Cal. Rptr. 718 (1979).

120. *Superior Strut & Hanger Co. v. Port of Oakland*, 72 Cal. App. 3d 987, 1002, 140 Cal. Rptr. 515 (1977) (procedure provided for no testimony, no fact-finding determination, no opportunity to be heard); *Bollengier v. Doctors Medical Ctr.*, 222 Cal. App. 3d 1115, 1128-29, 272 Cal. Rptr. 273, 279 (1990) (hospital's procedure provided adequate notice and minimal standards of fair procedure); *Tiholiz v. Northridge Hosp. Found.*, 151 Cal. App. 3d 1197, 199 Cal. Rptr. 338 (1984) (same).

121. *Ramos v. County of Madera*, 4 Cal. 3d 685, 691, 94 Cal. Rptr. 421, 425 (1971) (welfare fair hearings not equipped to deal with class actions or provide money damages); *Tiernan v. Trustees of the Cal. State Univ. & Colleges*, 33 Cal. 3d 211, 217, 188 Cal. Rptr. 115, 119 (1982) (procedure adequate to deal with claim of discharge infringing first amendment rights but not for claim that university must enact new regulations); *Glendale City Employees' Ass'n, Inc. v.*

unreasonably delaying resolution of the issue or has refused to take jurisdiction over it, is unfair to expect a litigant to resort to that remedy.¹²² It is possible that an excessive fee for invoking a remedy could render the remedy inadequate, but plaintiff has the burden to establish that it sought a fee waiver and, if waiver is denied, that the fee is unreasonable.¹²³

City of Glendale, 15 Cal. 3d 328, 342, 124 Cal. Rptr. 513, 523 (1975) (procedure handles individual cases, not complex dispute involving interpretation of memorandum of agreement); Horsemen's Benevolent & Prof. Ass'n v. Valley Racing Ass'n, 4 Cal. App. 4th 1538, 6 Cal. Rptr. 2d 698 (1992) (board cannot award money damages — remedy inadequate); Mounger v. Gates, 193 Cal. App. 3d 1248, 1256, 239 Cal. Rptr. 18, 23 (1987) (administrative appeal cannot remedy violation of procedural rights). At the federal level, see McCarthy v. Madigan, 112 S. Ct. 1081, 1091 (1992) (plaintiff sought only money damages which administrative procedure could not provide).

However, other California cases do require exhaustion of remedies even if the administrative procedure may not resolve all issues or provide the precise relief requested. Acme Fill Corp. v. San Francisco Bay Cons. & Dev. Comm'n, 187 Cal. App. 3d 1056, 1064, 232 Cal. Rptr. 348 (1986) (agency could not provide declaration that statute inapplicable to plaintiff); Edgren v. Regents of Univ. of Cal., 158 Cal. App. 3d 515, 520, 205 Cal. Rptr. 6, 9 (1984) (exhaustion of University's personnel remedies required even though plaintiff seeks damages in tort). These cases are questionable after Rojo v. Klieger, 52 Cal. 3d 65, 276 Cal. Rptr. 130 (1990) (exhaustion not required where agency cannot provide compensatory damages), overruling Westlake Community Hosp. v. Superior Court, 17 Cal. 3d 465, 131 Cal. Rptr. 90 (1976). However, *Rojo* involves primary jurisdiction rather than exhaustion of remedies.

It is difficult to generalize about the problem of misfitting remedies; sometimes exhaustion is required, sometimes not.

122. See McCarthy v. Madigan, 112 S. Ct. 1081, 1087 (1992); Kirkpatrick v. City of Oceanside, 232 Cal. App. 3d 267, 277, 283 Cal. Rptr. 191, 197 (1991) (stonewalling); Department of Personnel Admin. v. Superior Court, 5 Cal. App. 4th 155, 6 Cal. Rptr. 2d 714, 718-22 (1992) (agency declined to take jurisdiction); Los Angeles County Employees Ass'n v. County of Los Angeles, 168 Cal. App. 3d 683, 686, 214 Cal. Rptr. 350 (1985) (procedure cannot furnish remedy in time to prevent injury to employees); Hollon v. Pierce, 257 Cal. App. 2d 468, 64 Cal. Rptr. 808 (1964).

123. Sea & Sage Audubon Soc'y, Inc. v. Planning Comm'n, 34 Cal. 3d 412, 421-22, 194 Cal. Rptr. 357 (1983) (4-3 decision — dissent would place burden to establish reasonableness on agency).

iii. Constitutional issues.

Certain types of constitutional claims can be raised in court without first exhausting administrative remedies. For example, exhaustion is generally excused in cases of an on-the-face constitutional challenge to a provision of the statute that creates the agency¹²⁴ or to the procedures the agency provides.¹²⁵ Probably the constitutional excuse should also apply to on-the-face constitutional challenges to agency regulations or to statutes that the agency is applying.¹²⁶

124. As the California Supreme Court remarked, "It would be heroic indeed to compel a party to appear before an administrative body to challenge its very existence and to expect a dispassionate hearing before its preponderantly lay membership on the constitutionality of the statute establishing its status and functions." *State v. Superior Court*, 12 Cal. 3d 237, 251, 115 Cal. Rptr. 497 (1974). See also *Sail'er Inn v. Kirby*, 5 Cal. 3d 1, 6, 95 Cal. Rptr. 329, 332 (1971); *United States v. Superior Court*, 19 Cal. 2d 189, 195-96, 120 P.2d 26 (1941) (dictum); *Lund v. California State Employees Ass'n*, 222 Cal. App. 3d 174, 183, 271 Cal. Rptr. 425 (1990); *Chrysler Corp. v. New Motor Vehicle Bd.*, 89 Cal. App. 3d 1034, 1038-39, 153 Cal. Rptr. 135, 138 (1979).

125. *Horn v. County of Ventura*, 24 Cal. 2d 605, 611, 156 Cal. Rptr. 718 (1979) (one need not exhaust defective remedies to challenge their sufficiency); *Chevrolet Motor Div. v. New Motor Vehicle Bd.*, 146 Cal. App. 3d 533, 539, 194 Cal. Rptr. 270 (1983) (compliance with exact issue rule excused because attack is on constitutionality of Board's procedures).

It also appears that a litigant need not exhaust local remedies if those remedies are invalid under a state statute. See *Professional Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal. 2d 276, 287, 32 Cal. Rptr. 830 (1963) (no need to exhaust local remedies where those remedies are rendered inapplicable to plaintiff because of state statutes); *Friends of Lake Arrowhead v. San Bernardino County Bd. of Supervisors*, 38 Cal. App. 3d 497, 505-08, 113 Cal. Rptr. 539 (1974) (state statute preempts remedy provision of local ordinance).

126. See *Vogulkin v. State Bd. of Educ.*, 194 Cal. App. 2d 424, 434-35, 15 Cal. Rptr. 194 (1961) (exhaustion not required for constitutional attack on statutes that agency is applying). This decision is correct. No distinction should be drawn between a challenge to the constitutionality of the statute that created the agency and a challenge to the constitutionality of statutes that the agency is enforcing.

However, this distinction (i.e., requiring exhaustion for constitutional attacks on statutes the agency is applying but not to attacks on the statute creating the agency) is supported by dictum from older cases. See *United States v. Superior Court*, 19 Cal. 2d 189, 195, 120 P.2d 26 (1941); *Walker v. Munro*, 178 Cal. App. 2d 67, 2 Cal. Rptr. 737 (1960); *Tushner v. Griesinger*, 171 Cal. App. 2d 599, 341 P.2d 416 (1959). As discussed in the text, since 1978 the California

The constitutional excuse makes sense, since an agency is extremely unlikely to uphold such challenges. Indeed, a provision of the California Constitution adopted in 1978 explicitly prohibits agencies from holding statutes unconstitutional.¹²⁷ Thus the constitutional exception really is a subset of the inadequate-remedy exception: agency procedures are not adequate to deal with an on-the-face constitutional challenge to statutes, regulations, or procedures.

The constitutional exception should not be broadened very far since many legal claims can be stated in constitutional terms.¹²⁸ For example, a litigant might argue that agency action is “irrational” or “unreasonable” so that it denies substantive due process. Similarly, a claim that a regulation is ultra vires could be articulated in terms of the constitutional separation of powers. Or a claimed defect in notice or an allegedly biased decisionmaker might be a violation of procedural due process.¹²⁹ If by making

Constitution has prohibited an agency from invalidating any statute on constitutional grounds. Consequently, it is futile to ask an agency to consider the constitutionality of any statute and the pre-1978 cases requiring exhaustion in cases challenging constitutionality of statutes the agency is applying should not be followed.

127. The California Constitution (art. III, § 3.5) provides that no administrative agency (whether or not created by the California Constitution) can declare a statute unconstitutional or unenforceable on the basis of its being unconstitutional (unless an appellate court has already determined that the statute is unconstitutional). Similarly, an agency cannot declare a statute unenforceable on the basis that a federal statute or regulation prohibits its enforcement unless an appellate court has already so determined.

128. Some cases state restrictions on the constitutional exception that seem unnecessary. For example, a litigant should be able to get to court even though the litigant has already begun the administrative process; some cases indicate that the excuse is only available to people who have not begun availing themselves of that process. *Eye Dog Found. v. State Bd. of Guide Dogs for the Blind*, 67 Cal. 2d 536, 544, 63 Cal. Rptr. 21, 27 (1967).

129. The constitutional exception does not apply to a claim that the agency has misapplied otherwise valid procedural rules, even though the misapplication could be stated in constitutional terms. *Bollengier v. Doctors Medical Ctr.*, 222 Cal. App. 3d 1115, 1127-28, 272 Cal. Rptr. 273 (1990). See *Association of Nat'l Advertisers v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921

such claims litigant could avoid exhausting remedies, the requirement would nearly disappear. Therefore, these sorts of contrived constitutional claims are not sufficient to excuse a failure to exhaust.

The constitutional exception does not apply to constitutional attacks on statutes or regulations based on their application to the particular facts (as distinguished from an on-the-face attack).¹³⁰ In many as-applied challenges, the agency remedy is adequate, since some sort of variance or waiver procedure is available to avoid harsh or unreasonable application of the law.¹³¹ By the same token, the constitutional exception does not apply if material facts are in dispute and such facts must be found in order to resolve the constitutional dispute¹³² nor does it apply to non-constitutional

(1980) (Leventhal, J. concurring) (improper to review bias claim absent final agency action).

Another example of an attempt to turn a statutory claim into a constitutional one in order to avoid the exhaustion requirement occurred in *County of Contra Costa v. State*, 177 Cal. App. 3d 62, 74-75, 222 Cal. Rptr. 750, 758-59 (1986). This case involved the issue of whether statutes complied with the constitutional requirement that they reimburse local government for new state mandates. An agency (Board of Control) was created to adjudicate claims by local government that the Legislature had filed to comply with this mandate. The court correctly held that this remedy had to be exhausted, even though the local government plaintiffs stated their claim in constitutional terms. Clearly, the administrative remedy was wholly adequate for the purpose of dealing with plaintiff's claims.

130. *Security-First Nat'l Bank v. County of Los Angeles*, 35 Cal. 2d 319, 217 P.2d 946 (1950) (exhaustion requirement); *Griswold v. Mount Diablo Unified Sch. Dist.*, 63 Cal. App. 3d 648, 134 Cal. Rptr. 3 (1976) (exact issue requirement).

131. See *Metcalf v. County of Los Angeles*, 24 Cal. 2d 267, 148 P.2d 645 (1944); *Mountain View Chamber of Commerce v. City of Mountain View*, 77 Cal. App. 3d 82, 143 Cal. Rptr. 441 (1978). Indeed, it has been held that even an on-the-face constitutional attack is premature if the agency has a variance procedure that might solve the plaintiff's problem without reaching the constitutional question. *Smith v. City of Duarte*, 228 Cal. App. 2d 267, 39 Cal. Rptr. 524 (1964). However, this decision is questionable; generally a litigant is allowed to go to court with respect to constitutional claims even if he also has nonconstitutional defenses to raise before the agency.

132. *Sail'er Inn v. Kirby*, 5 Cal. 3d 1, 95 Cal. Rptr. 329 (1971) (dictum).

claims involved in the same case.¹³³ Probably, the exception should not apply at all if there are both constitutional and non-constitutional issues in the same case if an agency decision favorable to the litigant on a non-constitutional issue would dispose of the case. Such a decision would avoid the need for the court to reach the constitutional question at all.¹³⁴ And to excuse exhaustion in such a case would prolong the litigation since the petitioner will have to return to the agency to try the non-constitutional issues if he loses in court on the constitutional issues.

iv. Lack of notice.

Where a litigant failed to exhaust a remedy because he was not appropriately notified of its availability in time to use the remedy, the failure to exhaust is excused. This exception to exhaustion has been frequently recognized in local land use planning cases where persons affected by an application were not appropriately notified by either personal or constructive notice.¹³⁵ The exception should apply in such cases whether or not the plaintiff claims to be articulating the public interest or its own private interest.¹³⁶ The exception should also apply whether the defect in question is a failure to have exhausted a remedy or a failure to have raised the exact issue before the agency.

133. *Flores v. Los Angeles Turf Club*, 55 Cal. 2d 736, 746-48, 13 Cal. Rptr. 201 (1961).

134. However, if the objections were to the constitutionality of agency procedure, a litigant probably should not be required to exhaust illegal remedies even if those remedies might furnish substantive relief.

135. See *Environmental Law Fund v. Town of Corte Madera*, 49 Cal. App. 3d 105, 113, 122 Cal. Rptr. 282, 286 (1975). However, the exception does not apply where the planning authority has given notice to the community by publication as provided by statute. See *Sea & Sage Audubon Soc'y, Inc. v. Planning Comm'n*, 24 Cal. 3d 412, 417, 194 Cal. Rptr. 357, 360 (1983); *Redevelopment Agency of Riverside v. Superior Court*, 228 Cal. App. 3d 1487, 279 Cal. Rptr. 558 (1991).

136. The court in *Corte Madera* justified the exception for lack of notice by stating that persons protecting the public interest should not be prevented from litigating land use decisions of which they had not been notified. Of course, in these cases, it is difficult to separate public interest from private interest and it should not matter.

Another variation of this exception has been recognized in adjudicatory cases where the agency failed to call a litigant's attention to an available administrative remedy and, under the facts, the litigant's failure to find out about the remedy is justifiable.¹³⁷

v. Irreparable injury.

Abelleira recognized an irreparable injury exception to the exhaustion requirement but held that it was very narrow. The only situation of irreparable injury it accepted was a rate order that allegedly confiscated a utility's property by requiring it to operate unprofitably.¹³⁸ Later the Supreme Court applied the exception to a case in which a litigant claimed that by complying with state law it would violate a federal law and incur the risk of serious penalties.¹³⁹

Subsequent cases have continued to be skeptical of irreparable injury claims¹⁴⁰ although there have been some exceptions.¹⁴¹ At a

137. *Hittle v. Santa Barbara County Employees Retirement Ass'n*, 39 Cal. 3d 374, 384, 216 Cal. Rptr. 733 (1985); *Westlake Community Hosp. v. Superior Court*, 17 Cal. 3d 465, 478, 131 Cal. Rptr. 90, 97 (1976).

138. In *Abelleira*, the dissenters argued that the irreparable injury standard was met because of harm to the public (as opposed to the plaintiffs). The alleged harm was that illegal payments to unemployed workers would drain the compensation fund. However, the majority focused only on the harm to the plaintiffs which was not compelling. Similarly, *United States v. Superior Court*, 19 Cal. 2d 189, 120 P.2d 26 (1941), held that loss to handlers who were unable to market all oranges they had purchased was not irreparable since they did not allege the order would destroy their business.

139. *Sail'er Inn v. Kirby*, 5 Cal. 3d 1, 7, 95 Cal. Rptr. 329, 332 (1971) (not clear whether court applied the irreparable harm or the inadequate remedy exception).

140. *Mountain View Chamber of Commerce v. City of Mountain View*, 77 Cal. App. 3d 82, 143 Cal. Rptr. 441 (1978) (plaintiff must apply for variance from sign removal ordinance even though maintenance of nonconforming sign could violate civil and criminal nuisance statutes since no such enforcement action was threatened).

141. *Department of Personnel Admin. v. Superior Court*, 5 Cal. App. 4th 155, 6 Cal. Rptr. 2d 714, 721 (1992) (impact on state budget and layoffs of state employees); *Heyenga v. City of San Diego*, 94 Cal. App. 3d 756, 156 Cal. Rptr. 496 (1979) (preliminary injunction against transfer of police officer pending administrative appeal); *Greenblatt v. Munro*, 161 Cal. App. 2d 596, 605-07, 326 P.2d 929 (1958). *Greenblatt* applied the irreparable injury exception to a failure

minimum, a plaintiff seeking an exception to a failure to exhaust remedies by reason of irreparable injury should show that the injury is truly irreparable (and goes far beyond the expense and bother of litigation), that the injury is imminent (as opposed to an injury that will occur in the future if the plaintiff loses before the agency), and that the litigant could not have obtained a stay at the administrative level.

vi. Local tax issues.

Where a local tax assessment is alleged to be a “nullity” and there are no outstanding valuation issues, it is not necessary to exhaust the local tax dispute resolution remedy. An assessment might be a nullity, for example, where the property in question is tax exempt, nonexistent, or outside the taxing jurisdiction.¹⁴² This exception seems out of line with the existing structure of exhaustion exceptions; I see no persuasive rationale for it. The local tax appeal process seems the ideal place to obtain at least an initial decision of such disputes; the remedy is adequate and the harm is not irreparable.

2. Recommendations

a. Jurisdictional or discretionary

As noted above, *Abelleira* committed California to the position that a failure to exhaust remedies is a jurisdictional defect,¹⁴³ as

to have raised the exact issue before the agency. The injury was revocation of a liquor license. The licensee failed to raise an apparently meritorious legal defense before the agency; of course, by the time the case came to court, it was too late to raise the issue before the agency. The court remanded the case to the agency solely to reassess the penalty. See also *Volpicelli v. Jared Sydney Torrance Memorial Hosp.*, 109 Cal. App. 3d 242, 253-54, 167 Cal. Rptr. 610 (1980), which combined the exceptions for futility and irreparable harm.

142. *Stenocord Corp. v. City & County of San Francisco*, 2 Cal. 3d 984, 987, 88 Cal. Rptr. 166 (1970); California Administrative Mandamus § 2.41, at 57-58 (Cal. Cont. Ed. Bar, 2d ed. 1989).

143. It appears that a failure to comply with the exact issue rule is not a jurisdictional defect but failure to have exhausted an administrative remedy is jurisdictional.

opposed to a matter of trial court discretion.¹⁴⁴ Under the rule that exhaustion is jurisdictional, the trial court must decide whether a litigant falls within one of the existing narrowly drawn exceptions to exhaustion; if not, the court must dismiss the case.

I suggest that the issue of whether to excuse a failure to exhaust remedies be treated as within the trial court's discretion, as it is in federal law and under the Model Act.¹⁴⁵ The existing approach is simply too rigid; there are many cases in which a litigant comes close to satisfying several of the existing exceptions but does not quite fit any of them; yet requiring exhaustion would be very costly to the litigant and would serve no useful purpose.¹⁴⁶ Similarly, the parameters of some of the exceptions (such as inadequate remedies or constitutional issues) are fuzzy; rather than struggle with applying the rather abstractly stated exceptions to the particular facts, it would be better to decide whether the policies behind the exhaustion doctrine suggest that an exception should be made in the particular case.

Under this approach, courts would no longer be constrained by a few narrow exceptions but could combine several of them or invent new ones if necessary.¹⁴⁷ In a close case, the court should balance the equities,¹⁴⁸ considering such factors as:

144. A group of court of appeal cases treats the doctrine as discretionary despite *Abelleira*. See *supra* note 97.

145. However, if the Legislature mandates exhaustion of a specific remedy, exhaustion of that remedy would be treated as jurisdictional as under present law. See *McCarthy v. Madigan*, 112 S. Ct. 1081 (1992).

146. Several United States Supreme Court cases concerning failure to exhaust remedies within the Selective Service System are illustrative. Judicial review of a draft board's decision on a classification issue could be obtained only by raising the issue as a defense in the criminal proceeding for refusing induction. A failure to exhaust remedies meant that the registrant was stripped of his defense in the criminal case. Where the issue involved was purely one of law, the registrant had not deliberately bypassed Selective Service procedures, and an appeal would probably have been futile, exhaustion was excused. *McKart v. United States*, 395 U.S. 185 (1969). But where the claim was fact-based and excusing exhaustion would have encouraged registrants to bypass Selective Service procedures, exhaustion was required. *McGee v. United States*, 402 U.S. 479 (1971).

147. Thus a court might decide to hear a case despite failure to raise the exact issue where public policy demanded that the issue be resolved. *Lindeleaf v.*

- (1) the likelihood that plaintiff will prevail on the merits (i.e., is plaintiff's legal claim apparently well founded or patently contrived);¹⁴⁹
- (2) the relative degree of hardship to plaintiff from being compelled to exhaust remedies;
- (3) whether the remedy is still available (if not, dismissal of the case denies any judicial review);
- (4) the relative adequacy of agency remedies to deal with the question in dispute;
- (5) whether it would be important to establish a precedent on the legal issue in dispute;
- (6) the reason for failure to exhaust (i.e., was the failure justifiable or was it part of a scheme to avoid an unfavorable agency ruling);
- (7) judicial efficiency issues such as the question of whether agency expertise would contribute to solving the problem, whether the process in question would generate a factual record helpful to the court,¹⁵⁰ or whether facts are in dispute and must be found in order to reach the legal questions.

If exhaustion were made a matter of trial court discretion rather than of jurisdiction, it would be less likely that reviewing courts would grant writs aborting a trial court's decision to excuse a failure to exhaust remedies. In general, it seems better to me to let the trial court go ahead and decide a case it wants to decide without premature interruption from appellate courts. In theory, an appellate court could still grant a writ aborting premature judicial review

Agricultural Labor Relations Bd., 41 Cal. 3d 861, 870, 226 Cal. Rptr. 119 (1986).

148. See Power, *Help is Sometimes Close at Hand: The Exhaustion Problem and the Ripeness Solution*, 1987 U. Ill. L. Rev. 547 (advocating a balancing methodology in applying the exhaustion doctrine).

149. This factor is particularly important in cases where a litigant is seeking to avoid the exhaustion rule by reason of constitutional claims. A court should examine such claims closely to see whether they seem well-founded or merely contrived.

150. See *McCarthy v. Madigan*, 112 S. Ct. 1081, 1090 (1992).

on the basis of abuse of discretion, but this would be a rare occurrence.

Finally, if exhaustion is discretionary rather than jurisdictional, a failure to exhaust would be waived if the agency failed to object at the appropriate time before trial. Thus the failure to exhaust claim would and should be treated like any other claim or defense — it must be timely raised.¹⁵¹

It could be argued that this recommendation will seriously undercut the exhaustion rule by encouraging many more litigants to attempt to short circuit the administrative process. This might increase the burdens on the courts and thwart the policies behind the exhaustion doctrine. However, I do not believe this will be the case. Generally litigants will exhaust remedies regardless of the existence of a possible exception if there is any hope of a favorable agency outcome. The risk of going to court without exhausting remedies may be quite substantial: the court may dismiss the case on the basis of exhaustion and the administrative remedy may no longer be available. Even if it still remains available, an unsuccessful attempt to obtain premature judicial intervention would be very costly. The recommendation will not significantly change California law; it will be nearly as difficult as ever to circumvent the exhaustion requirement, but making the doctrine discretionary permits slightly more play in the joints.

b. Reconsideration

Both the existing California APA¹⁵² and other statutes¹⁵³ provide that a litigant need not request reconsideration from the agency before pursuing judicial review. However, the common law rule in

151. This would change present California law. But see *Green v. City of Oceanside*, 194 Cal. App. 3d 212, 219-23, 239 Cal. Rptr. 470 (1987) (failure to exhaust is waivable defect). I believe, however, that a court should be permitted to reject a waiver of exhaustion and to raise the exhaustion defense on its own motion if it believed judicial efficiency would be served by remanding the case to the agency.

152. Gov't Code § 11523.

153. Gov't Code § 19588 (State Personnel Board).

California may be otherwise.¹⁵⁴ A request for reconsideration should never be required as a prerequisite to judicial review¹⁵⁵ unless specifically provided by statute to the contrary.¹⁵⁶

c. Continuances and discovery

The existing APA permits immediate judicial review of the denial by an administrative law judge of a motion for a continuance.¹⁵⁷ Presumably, outside the APA agencies, a court would refuse to entertain such review because it would violate the exhaustion of remedies requirement and no exception to the exhaustion requirement would normally be applicable.¹⁵⁸ I have previously recommended that the revised APA contain no provision allowing immediate judicial review of the denial of a continuance. The Commission has deferred a decision on this question until it considers all issues relating to the exhaustion of remedies doctrine.

I believe that there is no justification for immediate judicial review of the denial of a continuance by an ALJ; such rulings by trial judges are not immediately appealable and the administrative law rule should be no different. Denial of a request for a continu-

154. *Alexander v. State Personnel Bd.*, 22 Cal. 2d 198, 137 P.2d 433 (1943).

155. "Reconsideration" means a request to the agency reviewing authority that it reconsider its own final decision. See Section 649.210 in administrative adjudication draft attached to Commission staff Memorandum 92-70 (Oct. 9, 1992) (on file with California Law Revision Commission) [hereinafter Memorandum]. [Ed. note. This provision was not included in the Commission's final recommendation.] The term does not refer to appeals to a higher agency level; normally such appeals are required by the exhaustion doctrine. In some agencies, such as the Workers' Compensation Appeals Board, appeal from a presiding officer's decision to the agency heads is referred to as "reconsideration." Such appeals would continue to be required, since they involve appeals to a higher level rather than reconsideration at the same level.

156. By statute, it is necessary to request reconsideration from the PUC before seeking review of a PUC decision in the California Supreme Court. PUC staff have told me that this reconsideration practice is very important to the agency. As a result, I do not suggest that the existing statute be altered.

157. Gov't Code § 11524(c), added to the APA in 1979.

158. More precisely, such review would violate the final order rule which, in California, is explicitly stated in Section 1094.5 and is generally treated as covered by the exhaustion requirement. See *supra* text accompanying notes 91-92.

ance should normally be unreviewable unless a court decides that an exception to the exhaustion rule (such as irreparable injury) is applicable.

Denial of a continuance is just one of many possible rulings by an ALJ prior to or at the hearing and there is no immediate review of any others. For example, an ALJ or an agency head might refuse to recuse herself because of bias or might proceed with a hearing despite having received *ex parte* contacts. She might refuse to hold a pre-hearing conference or exclude a relevant issue in the pre-hearing conference order. An ALJ might make a variety of rulings relating to evidence (such as refusing to uphold a claim of privilege). Indeed, an ALJ may rule that the agency has jurisdiction over a particular transaction on the facts, a proposition that the litigant believes is dead wrong. In all such cases, a party must completely exhaust remedies, all the way through the agency head level, before seeking review of the procedural or substantive ruling. In each of these cases, if the court decides the ALJ or agency heads erred, the case must be remanded to the agency and reheard. I see no justification for treating continuances differently; indeed, the harm done by denying a continuance and requiring the hearing to go ahead immediately seems trivial compared to the harm done to litigants by other sorts of errors.

Immediate review of the denial of a continuance is contrary to the purposes of the exhaustion doctrine. The timing of the hearing should be something solidly within the discretion of the ALJ; ALJs schedule their hearings (especially at remote locations) carefully and a last-minute request for a continuance can disrupt that schedule and leave an ALJ idle. Repeated requests for continuances by counsel are often used because an attorney is unprepared or because a client wishes to stall off the inevitable as long as possible. It seems inefficient to involve trial courts in this sort of dispute and it undermines the authority of the administrative judge. Moreover, by seeking judicial review, a party can obtain the very continuance that the ALJ has denied — even if the trial court denies the motion, the administrative hearing has been delayed. Thus immediate judicial review provides an easy end-run around the ALJ's decision to deny a continuance.

Another exhaustion issue that has been discussed by the Commission concerns discovery orders. The existing APA lodges all discovery disputes in the trial court,¹⁵⁹ but the Commission has decided that they should be settled at the agency level instead. Nevertheless, the current Commission draft preserves the right to seek a writ of mandate in the trial court against an agency discovery decision.¹⁶⁰ Again, this provision would be an exhaustion exception, providing a right of immediate review, regardless of whether a litigant could show some compelling need for immediate review.

For the reasons given above, I would treat discovery orders just like any other agency procedural decision; absent a sufficiently strong claim for an exhaustion exception, there should be no right of immediate review of an order either granting or denying discovery. Both the judicial efficiency and the separation of power rationales for exhaustion counsel against involvement of the court in discovery disputes; the ability to seek review of such rulings provides a handy way for counsel to delay and confuse the administrative proceeding. Just as we have eschewed formal civil discovery in the administrative process because of its potential for hindrance, we should also avoid premature judicial entanglement in discovery disputes.

d. Model Act

The Model Act provision on exhaustion¹⁶¹ seems satisfactory and should be used as the starting point for drafting a California provision.

i. General rule.

The Model Act clearly states the general exhaustion of remedies rule. "A person may file a petition for judicial review under this Act only after exhausting all administrative remedies available

159. Gov't Code § 11507.7. A trial court decision on discovery is not subject to appeal but can be reviewed through a writ of mandamus. Section 11507.7(h).

160. See Section 645.360 in administrative adjudication draft attached to Memorandum, *supra* note 155. [Ed. note. This provision was not included in the Commission's final recommendation.]

161. MSAPA § 5-107.

within the agency whose action is being challenged and within any other agency authorized to exercise administrative review....” It would be desirable to have the exhaustion rule stated in the statute in this clear form; under present law, exhaustion is mostly a judicial rather than a statutory doctrine.

The balance of the Model Act provision concerns the exceptions to the general rule. It wraps up all of the exhaustion exceptions¹⁶² into two standards: “the court *may* relieve a petitioner of the requirement to exhaust any or all administrative remedies, *to the extent* that the administrative remedies are *inadequate*, or requiring their exhaustion would result in *irreparable harm* disproportionate to the public benefit derived from requiring exhaustion.”¹⁶³ Note that by using the word “may” this provision is designed to make the exhaustion decision a matter of judicial discretion rather than jurisdiction.¹⁶⁴

ii. Who exhausted the remedy.

The Model Act provides for an exception that has already been discussed in the material relating to standing:¹⁶⁵ “A petitioner for judicial review of a rule need not have participated in the rule-making proceeding upon which that rule is based, or have petitioned for its amendment or repeal....”¹⁶⁶ As already noted, I believe the Model Act is right on this point. Provided that a remedy has been exhausted and the exact issue raised by someone, it should not matter whether the particular litigant has raised the issue or even participated at the agency level, provided that the litigant meets the normal criteria for standing to seek review.

162. The Model Act provides for one obvious exception: exhaustion is not required if this Act or another statute provides that it is not required. MSAPA § 5-107(2). This was intended to make clear that petitions for reconsideration are not required before seeking review since the provision relating to reconsideration is located elsewhere in the Act. MSAPA § 4-218(1).

163. MSAPA § 5-107(3) (emphasis added).

164. The comment makes this clear, contrasting the 1981 Model Act to the 1961 Act, which might be read as creating a non-discretionary standard.

165. See *supra* text accompanying notes 24-28, 71.

166. MSAPA § 5-107(1).

However, this provision should be generalized so that it covers all administrative proceedings, not just rulemaking, since much state or local land use planning decisionmaking is hard to classify as between rulemaking and adjudication.

iii. Exception for inadequate remedies.

Under the Model Act, exhaustion is not required “to the extent that the administrative remedies are inadequate....” This language accommodates the existing California exceptions for futility, inadequate remedies, certain constitutional issues, and lack of notice.¹⁶⁷ Thus the existing law on these points would be substantially preserved, subject to the caveat that the exhaustion would be a matter of trial court discretion so that a court could excuse a failure to exhaust in an appropriate case that does not quite fit one of the existing exceptions.

iv. Exception for irreparable injury.

The Model Act allows a court to excuse a failure to exhaust remedies if exhaustion “would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.” Here a balance is clearly called for. On the one hand, the harm to the litigant from being required to exhaust remedies must be evaluated. The existing California irreparable injury standard is extremely narrow; it should be broadened.¹⁶⁸ In appropriate circumstances, the court should be allowed to consider the cost of exhausting remedies and the particular litigant’s ability to bear that cost as well as such harms as business disruption, delay, bad publicity, and the like. Surely a factor worth considering is whether the remedy is still available. Against the harm must be weighed the benefits from requiring exhaustion, both in terms of judicial efficiency and separation of powers. Here a highly relevant factor would be the reason for the failure to exhaust remedies and whether it might be an attempted end-run around the agency to avoid an unfavorable agency decision.

167. See *supra* text accompanying notes 105-37.

168. See *supra* text accompanying notes 138-40. Some cases have been more lenient. See *supra* note 141.

e. The exact issue rule

I favor retaining the exact issue rule, with the understanding that the plaintiff need not have raised the issue below if somebody else did,¹⁶⁹ and with the further understanding that the courts can excuse a failure to have raised the exact issue if a litigant qualifies for an exception to the exhaustion rule. Probably the exact error rule and the exhaustion of remedies rule should be combined into a single provision.

The Model Act states an exact issue rule separately from its exhaustion rule. The exact issue provision states: "A person may obtain judicial review of an issue that was not raised before the agency only to the extent that..."¹⁷⁰ The Act then states a series of exceptions to the exact issue rule. However, they seem superfluous if the same exceptions applicable to exhaustion also apply to the exact issue rule.¹⁷¹

169. See *supra* text accompanying notes 165-66.

170. MSAPA § 5-112.

171. The Act excuses compliance with the exact issue rule "to the extent that (1) the agency did not have jurisdiction to grant an adequate remedy based on a determination of the issue...." That provision is unnecessary since the remedy would be inadequate in such a case.

Similarly, the Act excuses compliance with the exact issue rule "to the extent that ... (2) the person did not know and was under no duty to discover, or did not know and was under a duty to discover, but could not reasonably have discovered, facts giving rise to the issue...." Here again, the remedy would probably be considered inadequate.

The exact error rule is excused where "(5) the interests of justice would be served by judicial resolution of an issue arising from: (i) a change in controlling law occurring after the agency action; or (ii) agency action occurring after the person exhausted the last feasible opportunity for seeking relief from the agency." Again, this seems adequately covered by the inadequate remedies exception and by existing law. See *Lindeleaf v. Agricultural Labor Relations Bd.*, 41 Cal. 3d 861, 870, 226 Cal. Rptr. 119 (1986) (excusing failure to raise the exact issue in a case in which a change in law occurring after the agency action suggested an argument for the first time).

The Model Act excuses compliance with the exact error rule "to the extent that ... the agency action subject to judicial review is an order and the person was not notified of the adjudicative proceeding in substantial compliance with this Act..." MSAPA § 5-112(4). This provision would be superfluous since an exception to the exhaustion rule would normally apply: a remedy is inadequate

B. PRIMARY JURISDICTION

1. Distinguishing Primary Jurisdiction from Exhaustion of Remedies.

Under the doctrine of primary jurisdiction,¹⁷² a case properly filed in court, that asserts a right of action based on statute, common law or the constitution, may be shifted to an administrative agency that also has statutory power to resolve the issues in that case. Thus the agency, rather than the court, makes the *initial decision* in the case, but normally that court (or a different one) retains the power to *judicially review* the agency action.

The primary jurisdiction doctrine is inapplicable if the plaintiff is seeking judicial review of the validity of a rule or of a prior decision of the agency that has power to resolve the issue in the case. In such situations, the applicable doctrine is *exhaustion of administrative remedies*, as discussed above. Generally, primary jurisdiction issues arise when the lawsuit takes the form of *A v. B* but agency *C* has an administrative process that might resolve all or

to the extent that a litigant lacked actual or constructive notice of the adjudication or the procedure.

One Model Act exception seems questionable. It would excuse compliance with the exact error rule "to the extent that ... the agency action subject to judicial review is a rule and the person has not been a party in adjudicative proceedings which provided an adequate opportunity to raise the issue...." MSAPA § 5-112(3). I disagree with this exception. First, it requires the drawing of a line between rulemaking and adjudication, but that line is difficult to draw with respect to various kinds of local land use planning decisions. Second, this provision would change existing California law which does require presentation of the exact issue in connection with state or local decisions that, like rulemaking, require public participation. By not stating any exceptions to the exact issue rule (but simply incorporating the exhaustion exceptions), this exception should disappear since it is contrary to existing law.

172. See generally 4 K. Davis, *Administrative Law Treatise*, ch. 22 (2d ed. 1978 and Supp. 1989); B. Schwartz, *Administrative Law* 523-41 (3d ed. 1991); P. Verkuil, S. Shapiro & R. Pierce, *Administrative Law and Process* 190-200 (2d ed. 1991); Botein, *Primary Jurisdiction: The Need for Better Court/Agency Interaction*, 29 Rutgers L. Rev. 867 (1976); Jaffe, *Primary Jurisdiction*, 77 Harv. L. Rev. 1037 (1964).

part of the *A v. B* dispute. In contrast, exhaustion of remedies, not primary jurisdiction, applies when the lawsuit is *A v. Agency C*.¹⁷³

If the primary jurisdiction doctrine applies, the court has two choices:

- (1) if the agency is found to have exclusive jurisdiction over the case, or is empowered to deal with all of the issues in the case and the plaintiff would not be prejudiced thereby, the court should dismiss the case; or
- (2) if the agency does not have exclusive jurisdiction and is not empowered to deal with all of the issues in the case, or provide all possible remedies, or the plaintiff might otherwise be prejudiced by dismissal,¹⁷⁴ the court should issue a stay, send the appropriate issues to the agency, but retain the case on its docket until the agency has finished its processes. If the entire case has been shifted to the agency, the agency makes the initial decision. The case returns to court only for the purpose of providing judicial review of the agency's decision.¹⁷⁵ If one or

173. Sometimes it may be unclear which doctrine is applicable since agency *C* may have some connection to *B* (which might be a different government agency). In such cases, the court should apply whichever doctrine seems appropriate; essentially the question is whether the lawsuit is fundamentally judicial review of the action of the defendant unit of government (in which case it is an exhaustion case) as opposed to an independent lawsuit, the issues in which are within the remedial power of a government agency (in which case it is a primary jurisdiction issue). Because there may be a band of cases in which it is difficult to tell which is which, it is important that the exhaustion doctrine be made a matter of discretion rather than jurisdiction, see *supra* text accompanying notes 143-51, so that the court has the latitude to do what makes sense in the context of the given case.

174. See Jaffe, *supra* note 172, at 1054-59, arguing that a court should retain jurisdiction even if all issues have been shifted to agency, if plaintiff might be prejudiced by dismissal. For example, if the agency remedy is no longer available or the agency might dismiss the case after the judicial statute of limitations has run, the plaintiff could be prejudiced by dismissal. In such cases, the court should retain the case on its docket. Here again, the contrast with exhaustion of remedy rules is apparent.

175. A good example of the doctrine at work is provided by a recent Supreme Court decision. *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, (1990). A trucking company sued a shipper in federal district court for undercharges. Since the defense centered on the reasonableness of the rates, the court correctly shifted the case to the ICC. The ICC held that the rates were reasonable even though they were less than the filed rates. On judicial review, the Supreme

more issues, but not the entire case, has been shifted to the agency, the agency would resolve those issues. Then the court would decide the remaining issues, having the benefit of the agency's decision on some of the issues; it could judicially review the agency's resolution of those issues but not redecide them.

The federal courts have decided a vast number of primary jurisdiction cases; at least at a high level of generality, these decisions form a consistent pattern.¹⁷⁶ In general, where a litigant brings a case to court stating a claim for which relief can be granted, the court normally decides the case, even though an agency also has jurisdiction to decide one or more or all of the issues in the case.¹⁷⁷

This is the critical difference between primary jurisdiction and exhaustion of remedies: in exhaustion cases, the plaintiff must satisfy a burden of justifying immediate judicial review before administrative remedies have been exhausted. Immediate judicial review is provided only in exceptional circumstances. On the contrary, however, in cases involving competing claims for jurisdiction to try the case (i.e., there is a primary jurisdiction issue), the case

Court held that the ICC had failed to abide by the "filed rate" doctrine and reversed its decision. Thus the agency had the initial call, but the courts had the final call. For an earlier set of cases establishing the same pattern, see *Far East Conference v. United States*, 342 U.S. 570 (1952); *Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481 (1958).

176. Of course, there is a good deal of confusion among the federal cases in actually applying these standards, particularly in cases where there is a conflict between antitrust and regulatory regimes and legislative intention is unclear. See Botein, *supra* note 172.

177. An important Supreme Court decision that illustrates this observation is *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976). In this case, plaintiff's damage action for misrepresentation by the airline (failure to disclose overbooking) was allowed to proceed in court, despite the fact that the agency could have provided remedies for the same offense. Typical recent cases rejecting claims of primary jurisdiction are *Taffet v. Southern Co.*, 920 F.2d 847 (11th Cir. 1991) (action by utility customers complaining that rates were increased by utility's fraudulent concealment of accounting practices); *Marshall v. El Paso Natural Gas Co.*, 874 F.2d 1373 (10th Cir. 1989) (defendant negligently plugged plaintiff's wells).

should be shifted to the agency only if the defendant satisfies the burden of justifying this result.

In fact, primary jurisdiction problems are quite different from exhaustion problems and should be treated differently. Exhaustion relates solely to the timing of judicial review, whereas in primary jurisdiction cases a court and an agency have competing, concurrent claims to initially decide the case. In cases of competing trial jurisdiction, the plaintiff's case is legitimately in court; as a result, there is no separation of powers rationale for sending the case to an agency for decision.¹⁷⁸ Of course, there may be reasons of judicial efficiency for doing so; but the defendant must persuade the court that these efficiency claims outweigh the costs, complexities, and delays inherent in shifting a case legitimately in court to an agency where plaintiff must start all over again. Consequently, the presumption in a primary jurisdiction case is that the court should keep the case; in exhaustion cases, the presumption is that the court should dismiss the case.

2. When Primary Jurisdiction Applies Under Federal Law

In general, federal courts apply the primary jurisdiction doctrine, sending the case or the issue to the agency, in one of several situations: (1) the matter is highly technical and agency expertise would be helpful to the court in resolving the issue;¹⁷⁹ (2) the industry is so pervasively regulated by the agency that the regulatory scheme would be jeopardized by judicial interference; (3) there is a need for uniformity that would be jeopardized by the possibility of conflicting court decisions;¹⁸⁰ (4) there is evidence that the Legislature intended the issue to be resolved exclusively by the agency rather than a court.¹⁸¹ Even where the first three of those situations arise,

178. Of course, if the Legislature has "preempted" judicial jurisdiction by lodging exclusive trial jurisdiction in the agency, that legislative decision must be respected. Such cases are the clearest ones for applying primary jurisdiction.

179. *United States v. Western Pac. R. Co.*, 352 U.S. 59 (1959).

180. *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).

181. Where the agency has statutory power to exempt the practice in question from liability (whether from tort damages, antitrust damages or any other right enforced in court), the Legislature obviously intended that the agency have the

the court has discretion to retain and decide the case, rather than sending it back to the agency, if there are persuasive reasons for doing so.¹⁸²

3. California Law

The doctrine of primary jurisdiction has not been well developed in California. Most of the cases in which the problem arises describe the issue incorrectly as a problem of exhaustion of remedies and struggle to apply the exhaustion exceptions.¹⁸³ Yet the courts often sense that somehow the problem is different from the conventional exhaustion problem and the exhaustion exceptions seem to be applied more leniently. The result is a jumbled mass of cases. To clear up this confusion, California badly needs a statutory provision on primary jurisdiction.

a. Cumulative remedy doctrine

In a few rather narrowly defined classes of cases, courts can proceed despite the presence of an administrative remedy. Where a single statute (or perhaps a single California code) provides a litigant with a choice of administrative or judicial remedies, the liti-

power to pass on the practice before it could be dealt with by a court. For discussion of the complexities in balancing regulatory power with the antitrust laws, see Jaffe, *supra* note 172, at 1060-70; K. Davis, *supra* note 172, at §§ 22.6-22.10.

182. Jaffe, *supra* note 172, at 1050.

183. See, e.g., Department of Personnel Admin. v. Superior Court, 5 Cal. App. 4th 155, 6 Cal. Rptr. 2d 714, 718-22 (1992); Hollon v. Pierce, 257 Cal. App. 2d 468, 64 Cal. Rptr. 808 (1967) (applies exhaustion exceptions). Infrequently, the court refers correctly to the issue as one of primary jurisdiction. See National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 448-51, 189 Cal. Rptr. 346, 366-68 (1983) (identifying issue as primary jurisdiction); County of Alpine v. County of Tuolumne, 49 Cal. 2d 787, 322 P.2d 449, 452, 455 (1958) (same); E. B. Ackerman Importing Co. v. City of Los Angeles, 61 Cal. 2d 595, 39 Cal. Rptr. 726 (1964) (court stays action while parties obtain determination from Federal Maritime Commission). Even less often, a case will recognize that there is a difference between the doctrines. Common Cause v. Board of Supervisors, 49 Cal. 3d 432, 441 n.6, 261 Cal. Rptr. 574, 579 n.6 (1989) (primary jurisdiction is not jurisdictional so that failure to raise the defense in the trial court waives it).

gant can choose the judicial one.¹⁸⁴ Similarly, where a statute provides a new remedy that enforces an already existing common law right, the remedy is cumulative rather than exclusive. Whereas, if the new remedy does not codify an existing common law right, it is exclusive.¹⁸⁵ Finally, in cases involving water rights, a system of concurrent jurisdiction exists — plaintiffs can choose to go to the Water Board or to court.¹⁸⁶

These rules are confusing and seem ad hoc. Essentially they ask the wrong question. Normally, persons should be allowed to pursue judicial rights, despite existence of an administrative remedy (whether in the same code or elsewhere, and whether or not it codifies a common law right), unless the Legislature intended to make the administrative remedy exclusive or there is some other good reason to shift the case to the agency.

b. Reaching right result for wrong reason

While treating the primary jurisdiction problem as a problem of exhaustion of remedies, California courts have often reached results that in fact reflect primary jurisdiction theory while twisting exhaustion theory. In a recent California Supreme Court case, *Rojo*

184. *City of Susanville v. Lee C. Hess Co.*, 45 Cal. 2d 684, 290 P.2d 520, 523 (1955); *Scripps Memorial Hosp. v. California Employment Comm'n*, 24 Cal. 2d 669, 673, 151 P.2d 109, 112 (1944) (an exhaustion rather than a primary jurisdiction case); *Lachman v. Cabrillo Pac. Univ.*, 123 Cal. App. 3d 941, 177 Cal. Rptr. 21 (1981); *In re Steinberg*, 197 Cal. App. 2d 264, 17 Cal. Rptr. 431, 434 (1962) (remedy cumulative).

185. See *Flores v. Los Angeles Turf Club*, 55 Cal. 2d 736, 13 Cal. Rptr. 201 (1961) (new remedy exclusive); *McKee v. Bell-Carter Olive Co.*, 186 Cal. App. 3d 1230, 1239-46, 231 Cal. Rptr. 304, 310-14 (1986) (new remedy cumulative); *Karlin v. Zalta*, 154 Cal. App. 3d 953, 201 Cal. Rptr. 379 (1984) (new remedy exclusive).

186. *National Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 448-51, 189 Cal. Rptr. 346, 366-68 (1983). The Court indicated that because of the highly technical nature of the issues and the Water Board's expertise, it would be better to give exclusive jurisdiction to the Board. However, it felt constrained by contrary precedent. Instead, the Court interpreted relevant statutes to provide that a superior court can refer any issues to the Board as a referee or a master. This solution is wholly consistent with a system of primary jurisdiction that permits one or more of the issues in the case to be referred to an agency while the court retains the matter on its docket.

v. Klieger,¹⁸⁷ the issue was whether a damage action in tort by an employee against her employer for sexual harassment should be dismissed by reason of plaintiff's failure to exhaust the investigation and conciliation remedy under the Fair Employment and Housing Act (FEHA).¹⁸⁸ For the reasons that plaintiff's claim was based on common law, rather than on violation of the FEHA, and because the FEHC lacked power to award tort damages (as opposed to make-whole relief), the Court held that the remedy need not be exhausted and her suit could proceed.¹⁸⁹

As an exhaustion of remedies case, the Court's decision in *Rojo* is unpersuasive. The case did not clearly fit any of the established exhaustion exceptions and the Supreme Court did not claim that it did.¹⁹⁰ In fact, a better analysis would be to treat the case as one involving a primary jurisdiction claim. The court had original

187. 52 Cal. 3d 73, 276 Cal. Rptr. 130 (1990).

188. Under FEHA, the Department of Fair Employment and Housing investigates a discrimination claim and attempts to conciliate the dispute. If this is unsuccessful, on request it issues a "right to sue" letter permitting the complainant to file in court. Alternatively, the complainant can allow the Department to pursue her claim before the Fair Employment and Housing Commission. However, because FEHC lacks power to award compensatory and punitive damages, most complainants request right to sue letters and go to court. The issue in *Rojo* was whether the court could hear a common law tort case (as opposed to a claim based on the civil rights statute) where this administrative investigation and conciliation remedy had not been resorted to.

189. Similarly, see *Horsemen's Benevolent & Protective Ass'n v. Valley Racing Ass'n*, 4 Cal. App. 4th 1538, 6 Cal. Rptr. 2d 698 (1992) (exhaustion not required in contract dispute between horse owners and track operators since Horse Racing Board not empowered to grant contract damages).

190. Because the Fair Employment and Housing Commission could not award the damages plaintiff was seeking, it could be argued that the administrative remedy was inadequate. However, it could also be argued that the administrative remedy was adequate or at least useful, in that the Department's investigation could turn up useful evidence and the Department might have successfully settled the dispute, thus keeping it out of court. See *Acme Fill Corp. v. San Francisco Bay Cons. & Dev. Comm'n*, 187 Cal. App. 3d 1056, 1064, 232 Cal. Rptr. 348 (1986) (exhaustion required even though remedy could not provide all of the desired relief); *Edgren v. Regents of Univ. of Cal.*, 158 Cal. App. 3d 515, 520, 205 Cal. Rptr. 6, 9 (1984) (exhaustion of University's personnel remedies required even though plaintiff seeks damages in tort).

jurisdiction over the employee's tort claim.¹⁹¹ That lawsuit did not seek judicial review of administrative action; it sought tort damages against an employer. None of the reasons for applying primary jurisdiction applied: (1) the case was not technical and the agency had no real expertise to contribute, (2) the industry was not pervasively regulated, (3) there was no risk of conflicting court decisions, (4) there was no evidence that the Legislature intended such cases to be sent to the agency.¹⁹² Thus the Court reached the correct result, although for the wrong reason.¹⁹³

c. When primary jurisdiction applies: technical issues

As stated above, federal courts apply primary jurisdiction when a case involves difficult technical problems that require application of agency expertise. California cases have done the same while purporting to apply exhaustion of remedies.¹⁹⁴ *Karlin v. Zalta*¹⁹⁵ was a class action alleging a conspiracy to fix medical malpractice

191. A key part of the *Rojo* decision was the Court's determination that the Legislature had not preempted the common law tort action for damages for discrimination or sexual harassment. *Rojo v. Klieger*, 52 Cal. 2d 73, 73-82, 276 Cal. Rptr. 130, 133-40 (1990).

192. The Court held that the Legislature did intend that FEHA remedies be exhausted when plaintiff makes a claim for violation of the FEHA itself as opposed to a common law tort claim.

193. In the process it limited the reach of an earlier case, *Westlake Community Hosp. v. Superior Court*, 17 Cal. 3d 465, 131 Cal. Rptr. 90 (1976), in which a doctor seeking damages against a hospital that had expelled him from the staff was required to exhaust internal hospital remedies, even though those remedies did not include damages. This case was limited to remedies provided by private associations as distinguished from public agencies, as in *Rojo*. A more persuasive distinction of *Westlake* would be that it was an exhaustion case; the doctor was suing the hospital that provided the remedy in question, not a third party. Normally, in exhaustion cases, the remedy should be exhausted even though it is not completely adequate to satisfy all of the plaintiff's needs.

194. In *National Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 448-51, 189 Cal. Rptr. 346, 366-68 (1983), the Court held that the courts and Water Board had concurrent jurisdiction over cases involving conflict between appropriate water rights and the public trust doctrine. It also held that courts could refer especially difficult or technical issues to the Board as a referee or master. This is wholly consistent with primary jurisdiction which allows the assignment of one or more issues to an agency while the court retains the case on its docket.

195. 154 Cal. App. 3d 953, 979-87, 201 Cal. Rptr. 379, 394-400 (1984).

insurance rates in violation of state antitrust laws and seeking money damages. Insurance rate-fixing conspiracies are within the supervision of the Insurance Commissioner and are exempt from the antitrust laws. However the Commissioner has no power to award damages. The court dismissed the case under the exhaustion doctrine.

As a primary jurisdiction case, *Karlin* reached the right result, for the case required “a searching inquiry into the factual complexities of medical malpractice insurance ratemaking,” whereas the statute “comprises a pervasive and self-contained system of administrative procedure for the monitoring both of insurance rates and the anticompetitive conditions that might produce such rates.”¹⁹⁶ Consequently, *Karlin* fell within one or perhaps two of the established criteria for application of primary jurisdiction: (1) cases involving highly technical issues where the expertise of the agency would be helpful to courts and (2) cases where the Legislature intended that such cases be tried in the agency.¹⁹⁷

However, appropriate procedure in *Karlin* would have called for the court to retain the case on its docket while it was being considered by the agency, so that if the agency found that the conspiracy existed and should not be exempted from the antitrust laws, plaintiff would retain its claim for damages without concern that the statute of limitations would run out on it.¹⁹⁸

d. When primary jurisdiction applies: legislative intent

Another type of case in which primary jurisdiction applies is often referred to as “preemption”: the Legislature intended this sort of case to be sent to an agency, thus preempting judicial remedies.

196. 154 Cal. App. 3d at 983, 201 Cal. Rptr. at 397.

197. This branch of the case law is discussed in *infra* text accompanying note 199.

198. A similar error appears in *Wilkinson v. Norcal Mutual Ins. Co.*, 98 Cal. App. 3d 307, 159 Cal. Rptr. 416 (1979), which involved an action by a single doctor claiming that his insurance rates were excessive. The court dismissed for failure to exhaust remedies instead of retaining the case on its docket for computation of damages in the event the agency found the rate to be excessive or illegal. See also *Morton v. Hollywood Park, Inc.*, 73 Cal. App. 3d 248, 139 Cal. Rptr. 584 (1977).

For example, workers' compensation or unemployment compensation disputes between employer and employee must be tried before the appropriate agency, not in court. California cases correctly apply this doctrine, for example, refusing to allow trial courts to entertain cases involving agricultural labor disputes that should be heard before the Agricultural Labor Relations Board.¹⁹⁹

e. Exigent circumstances

Even where a case probably should be sent to the agency because primary jurisdiction is applicable, a court should retain discretion to decide the case immediately because of exigent circumstances. For example, in *Department of Personnel Administration v. Superior Court*,²⁰⁰ the issue was whether to send a case properly in the superior court for initial decision to the Public Employment Relations Board (PERB), which normally would have been required because of a statutory provision. However, purporting to apply the exhaustion exceptions for futility²⁰¹ and irreparable injury,²⁰² the

199. *United Farm Workers v. Superior Court*, 72 Cal. App. 3d 268, 140 Cal. Rptr. 87 (1977). As that court put it, if unfair labor practice cases could be decided by judicial declaratory judgments, "the Board would be replaced by ad hoc determinations by already overcrowded courts. The legislative effort to bring order and stability to the collective bargaining process would be thwarted. The work of the Board would be effectively impaired, its decisions similar in impression to that of a tinkling triangle practically unnoticed in the triumphant blare of trumpets." 72 Cal. App. 3d at 272, 140 Cal. Rptr. at 90. In dictum, the court recognized a possible exception for extremely clear-cut statutory errors by the Board. See also *Leedom v. Kyne*, 358 U.S. 184 (1958).

Similarly, see *San Diego Teachers Ass'n v. Superior Court*, 24 Cal. 3d 1, 12-14, 154 Cal. Rptr. 893, 900-02 (1979) (Legislature intended to make issue of enjoining teacher strike a matter for exclusive initial jurisdiction of PERB); *California Sch. Employees Ass'n v. Travis Unified Sch. Dist.*, 156 Cal. App. 3d 242, 250, 202 Cal. Rptr. 699, 703 (1984) (issue not one within PERB's exclusive initial jurisdiction); *Wygant v. Victor Valley Joint Union High Sch. Dist.*, 168 Cal. App. 3d 319, 323-25, 214 Cal. Rptr. 205, 207-08 (1985) (same).

200. 5 Cal. App. 4th 155, 6 Cal. Rptr. 2d 714, 721 (1992).

201. The basis for the futility exception was that PERB had declined jurisdiction over the case.

202. An immediate judicial decision was needed because the issues involved the state's budget crisis and delay would have cost the jobs of additional state employees.

court retained the case. While the case should have been analyzed as one of primary jurisdiction, the court probably reached the correct result; this was an appropriate case for exercising discretion to retain the case even though normally under primary jurisdiction it would have been sent to the agency.

f. Incorrect results under California law

While courts have usually reached appropriate results despite relying on exhaustion rather than primary jurisdiction theory, this has not always been the case. Sometimes, cases legitimately in court have been dismissed for failure to exhaust administrative remedies because no exhaustion exception was applicable.²⁰³ For example, *Yamaha Motor Corp., U.S.A. v. Superior Court*,²⁰⁴ was a breach of contract action by a franchisee arising out of failure to supply the franchisee with a new product (RIVA) produced by Yamaha and other related breaches of contract.²⁰⁵ Because the New Motor Vehicle Board has power to prevent modification of franchise contracts, the court held that the franchisee had to exhaust the remedy before the Board.

The *Yamaha* case seems wrong absent some indication the Legislature wished to preempt normal judicial contract remedies in motor vehicle cases. The Board could not provide contractual remedies such as damages.²⁰⁶ Moreover, in another case involving a different franchisee, the Board had declined to provide relief because Yamaha had good cause to modify the contract and because the modification would not substantially affect the franchisee's investment. Yet the court held the futility exception to exhaustion was not applicable since the Board might distinguish

203. See, e.g., *Woodard v. Broadway Fed. Sav. & Loan Ass'n*, 111 Cal. App. 2d 218, 244 P.2d 267 (1952) (judicial contest over election of directors — remedy before Federal Home Loan Bank Board must be exhausted).

204. 185 Cal. App. 3d 1232, 230 Cal. Rptr. 382 (1986).

205. For example, plaintiff alleged Yamaha's bad faith abandonment of advertising of its other products due to emphasis on the new one. It also alleged discrimination against plaintiff in the allocation of motorcycles in retaliation for Van Nuys' objections to Yamaha's policies.

206. For that reason, it is arguable that the *Yamaha* case was overruled by *Rojo v. Klieger*, discussed *supra* in text accompanying notes 187-93.

the prior case. This seems like the wrong question to be asking. The franchise contract did not contain a provision allowing the manufacturer to modify it; it would appear that the statute left the franchisee a choice whether to pursue its remedies before the Board or to go to court for breach of the franchise agreement.

Thus *Yamaha* was a primary jurisdiction, not an exhaustion case. Using primary jurisdiction theory, the court should have kept the case, but using exhaustion theory it required the case to be dismissed. The result of this sort of reasoning was not only to force the franchisee to utilize a misfitting set of remedies but also to probably lose its right to damages entirely, even if the Board sustained its position, since the statute of limitations might well run on the contract claim. In a case of competing trial jurisdiction between court and agency, the presumption should be in favor of retaining the case in court, not dismissing it, absent a strong reason to apply primary jurisdiction and send it to the agency.

4. Recommendation

Because California cases have confused exhaustion of remedies and primary jurisdiction, I suggest that a statutory provision in a new APA should recognize the difference. Because the instances in which primary jurisdiction should apply are difficult to reduce to a simple formula, however, the statute probably should not try to articulate such a formula.

A statute might provide first that a court should send an entire case, or one or more issues in a case, to an agency for an initial decision where the Legislature intended that the agency have exclusive jurisdiction over that type of case or issue. Second, the statute might provide that a court could, in its discretion, also send a case, or one or more issues in the case, to an agency for initial decision where the benefits to the court in doing so outweigh the extra delays and costs to litigants inherent in doing so. The statute, or a comment, should also point out that the court in its discretion could request that the agency file an amicus brief setting forth its

views on the case as a less expensive alternative to actually shipping the case over to the agency.²⁰⁷

The comment might then suggest the situations in which the court should exercise this discretionary power.²⁰⁸ These would include (1) the matter is highly technical and agency expertise would be helpful to the court in resolving the issue; (2) the industry is so pervasively regulated by the agency that the regulatory scheme would be jeopardized by judicial interference; (3) there is a need for uniformity that would be jeopardized by the possibility of conflicting court decisions.

C. RIPENESS

The doctrine of ripeness in administrative law counsels a court to refuse to hear an on-the-face attack on an agency rule or policy until the agency takes further action to apply it in a specific factual situation. Ripeness is distinguishable from exhaustion of remedies because the exhaustion doctrine requires plaintiff to take all possible steps to deal with the problem at the agency level before coming to court. Ripeness, on the other hand, requires a court to stay its hand until the agency (as distinguished from the plaintiff) has taken further steps.

The ripeness doctrine is well accepted in California administrative law,²⁰⁹ often arising as a question of judicial discretion as to whether to issue a declaratory judgment.²¹⁰ Because the judicially defined test appears to be working well, and because it requires a balancing test that is difficult to reduce to statutory form, I believe it is unnecessary to enact statutory provisions codifying the ripeness doctrine. However, there should be a comment to the exhaustion section making it clear that the Legislature recognizes

207. See *Distrigas of Mass., Inc. v. Boston Gas Co.*, 693 F.2d 1113 (1st Cir. 1982) (agency's views are needed but not necessary to have full-fledged agency proceeding to obtain these views).

208. A more detailed set of standards for exercising discretion are spelled out in Botein, *supra* note 172, at 878-90.

209. See 2 G. Ogden, *California Public Agency Practice* § 51.01 (1992).

210. Section 1061.

the existence of the ripeness doctrine and does not believe there is any necessity to change or codify it.

The leading case applying the ripeness doctrine in the administrative context is *Pacific Legal Foundation v. Coastal Commission*²¹¹ in which plaintiff attacked the Commission's guidelines on coastal access on their face. The California Supreme Court ordered the case dismissed because of a lack of ripeness. The Court indicated a preference for adjudicating such cases in the context of an actual set of facts so that the issues could be framed with enough definiteness to allow courts to dispose of the controversy. Yet it also indicated that courts would resolve such disputes if deferral would cause lingering uncertainty, especially where there is widespread public interest in the question. It observed that courts should not issue advisory opinions; the issue must be such that the court's judgment would provide definite and conclusive relief.²¹²

To decide when the courts should address challenges to guidelines before they have been applied to plaintiff, the *Pacific Legal Foundation* Court adopted the balancing test articulated in the leading federal case, *Abbott Laboratories v. Gardner*.²¹³ *Abbott Laboratories* evaluates ripeness claims by assessing and balancing two factors: the fitness of the issues for immediate judicial review and the hardship to the plaintiff from deferral of review.

Generally issues are considered fit for immediate review if they are part of final agency action (i.e., the agency is not reconsidering the rule and it is issued in formal fashion from a high level within the agency) and the issue is basically legal rather than factually oriented.²¹⁴ In *Pacific Legal Foundation*, the issues were not fit for

211. 33 Cal. 3d 158, 188 Cal. Rptr. 104 (1982).

212. See *Selby Realty Co. v. City of San Buenaventura*, 10 Cal. 3d 110, 109 Cal. Rptr. 799 (1973) (declaratory judgment on effect of general plan on plaintiff's property calls for advisory opinion as the judgment would not resolve controversy between parties).

213. 387 U.S. 136 (1967). *BKHN, Inc. v. Department of Health Servs.*, 3 Cal. App. 4th 301, 4 Cal. Rptr. 2d 188 (1992), also employs the *Abbott Labs* methodology.

214. A case is ripe where it has reached, but not yet passed, the point where the facts have sufficiently congealed to permit an intelligent and useful decision

immediate review because the Court found it difficult to assess the guidelines in the abstract. Everything would turn on the specific factual context in which they would be applied. The guidelines were flexible, general, and not even mandatory. Thus the lack of concreteness mandated a deferral of review.²¹⁵

The hardship to plaintiff from deferral of review often arises from the fact that the rule confronts plaintiff with an immediate and serious dilemma: comply with the rule (abandoning a planned course of conduct) or risk violation of the rule (with serious legal and practical consequences). In *Pacific Legal Foundation*, there was no such dilemma: nobody would have a problem until they actually applied for a permit. Possibly, the Court conceded, people would be inhibited in their planning (for example, they might hesitate to hire an architect), but that was not sufficient hardship.²¹⁶

Undoubtedly, the Court would take account of the public interest in evaluating the ripeness equation: the public interest might be served by providing an immediate answer to a difficult question, thus avoiding piecemeal litigation;²¹⁷ or it might be served by

to be made. *Sherwyn v. Department of Social Servs.*, 173 Cal. App. 3d 52, 218 Cal. Rptr. 778 (1985); *California Water & Tel. Co. v. County of Los Angeles*, 253 Cal. App. 2d 16, 61 Cal. Rptr. 618 (1967).

215. Similarly, see *BKHN*, 3 Cal. App. 4th at 301 (issue of whether state law ever provides joint and several liability for cleanup costs too difficult to answer in abstract).

216. See also *BKHN*, 3 Cal. App. 4th at 301 (P not seriously harmed by delay in getting answer to question of whether state law ever provides joint and several liability for cleanup costs); *Newland v. Kizer*, 209 Cal. App. 3d 647, 659, 257 Cal. Rptr. 450, 457 (1989) (no immediate need to construe statute providing time for patient at decertified nursing home to find a new home because no immediate threat of decertification); *Teed v. State Bd. of Equalization*, 12 Cal. App. 2d 162, 55 P.2d 267 (1936) (letter from Board contains no threats, merely informs P that current practice will be continued).

217. See *Californians for Native Salmon v. Department of Forestry*, 221 Cal. App. 3d 1419, 271 Cal. Rptr. 270 (1990) (agency policy of ignoring laws regarding timber harvest plans — declaratory judgment would avoid piecemeal litigation); *Selinger v. City Council of Redlands*, 216 Cal. App. 3d 259, 264 Cal. Rptr. 499 (1989) (public interest requires that court reach issue of interpretation of state law deeming application approved after one year); *Regents of Univ. of Cal. v. State Bd. of Equalization*, 73 Cal. App. 3d 660, 140 Cal. Rptr. 857 (1977)

deferring review and allowing the administrative or legislative process to run its course.²¹⁸ These factors vary enormously from case to case, which makes it difficult to reduce the ripeness formula to statutory form.

Since California law, exemplified by *Pacific Legal Foundation*, correctly applies the federal ripeness test, and because of the highly abstract and case-specific nature of the ripeness equation, I see little reason to try to reduce the test to statutory form. However, it should be made clear in a comment that the new legislation (including specific provisions on exhaustion and primary jurisdiction) is not intended to disapprove the prevailing judicial approach.

D. STATUTE OF LIMITATIONS ON SEEKING REVIEW OF ADJUDICATORY ACTION

A new judicial review statute should impose a uniform limitations period. Present law has scattered and inconsistent provisions.

1. Present Law

Under present law, two generic statutes provide the limitations period for large numbers of agency adjudicatory actions. Under Government Code Section 11523, adjudicatory decisions under the existing APA are subject to a 30-day limitation period.²¹⁹ The 30-

(public interest in answering question about taxability of University property); *California Water & Tel. Co. v. County of Los Angeles*, 253 Cal. App. 2d 16, 61 Cal. Rptr. 618 (1967) (whether county ordinance regulating water company is preempted by state law).

218. See *Zetterberg v. Department of Pub. Health*, 43 Cal. App. 3d 657, 118 Cal. Rptr. 100 (1975) (review would interfere with political process).

219. This provision puts considerable weight on the distinction between adjudicatory action, reviewable under Section 1094.5, and other agency action reviewable under traditional mandamus, as to which no special statute of limitation applies. See *Morton v. Board of Registered Nursing*, 235 Cal. App. 3d 1560, 1 Cal. Rptr. 2d 502 (1991) (Board's action reviewable under Section 1094.5 so 30-day period applies).

The 30-day period of Section 11523 is a statute of limitations, not a jurisdictional provision, and therefore is subject to the same rules applicable to any statute of limitations. As a result, the agency can be estopped to plead the statute if its representations resulted in a petitioner's failure to meet the deadline. *Giins v. Savage*, 61 Cal. 2d 520, 39 Cal. Rptr. 377 (1964).

day period runs from the last day on which reconsideration can be ordered.²²⁰ Petitioner must request the agency to prepare the record (including a transcript), and the agency must supply it within 30 days after the request. If the petitioner requests the agency to prepare the record within 10 days after the last day on which reconsideration can be ordered, the time for filing a petition for writ of mandate is extended until 30 days after delivery of the record.

Code of Civil Procedure Section 1094.6 applies to judicial review of local adjudicatory agency action (other than school districts).²²¹ The limitation period is 90 days following the date on which the decision becomes final. If there is no provision for reconsideration of the decision, the decision is final on the date it is made. If there is provision for reconsideration, the decision is final on the expiration of the period for which reconsideration can be sought. If reconsideration is sought, the decision is final on the date reconsideration is rejected.²²²

Section 1094.6 provides that the agency must deliver the record to the petitioner within 90 days after it is requested; if such request is filed within 10 days after the decision becomes final, the time for filing a petition is extended to not later than the 30th day following the date on which the record is either personally delivered or

220. The power to order reconsideration expires 30 days after delivery or mailing of a decision, or on the date set by the agency as the effective date of the decision if that occurs prior to expiration of the 30-day period, or at the termination of a stay of not to exceed 30 days which the agency may grant for the purpose of filing an application for reconsideration. Gov't Code § 11521. See also *De Cordoba v. Governing Bd.*, 71 Cal. App. 3d 155, 139 Cal. Rptr. 312 (1977); *Koons v. Placer Hills Union Sch. Dist.*, 61 Cal. App. 3d 484, 132 Cal. Rptr. 243 (1976). Both cases hold that where an agency makes its decision effective immediately, thus precluding reconsideration, the 30-day period runs from the date of delivery or mailing of the formal agency decision.

221. The section applies only to decisions made, after hearing, that suspend, demote, or dismiss an officer or employee; revoke or deny an application for a permit, license, or other entitlement; or deny an application for a retirement benefit or allowance. All other local adjudications, such as land use planning decisions, are not subject to the 90-day rule of Section 1094.6.

222. Section 1094.6(b).

mailed to the petitioner or his attorney.²²³ Finally, the agency must provide notice to the party that the time within which judicial review must be sought is governed by Section 1094.6;²²⁴ cases have held that the 90-day period is tolled until such notice is provided.²²⁵

The 30- or 90-day periods provided by Sections 11523 and 1094.6 are not extended for an additional five days (or ten days outside the state) because the decisions were mailed.²²⁶

Various other sections applicable to particular agencies contain different provisions relating to the timing of review of adjudicatory action that are inconsistent in various ways with the two generic sections already summarized.²²⁷

223. Section 1094.6(d).

224. Section 1094.6(f).

225. *El Dorado Palm Springs, Ltd. v. Rent Review Comm'n*, 230 Cal. App. 3d 335, 281 Cal. Rptr. 327 (1991) (notice can be oral or written); *Cummings v. City of Vernon*, 214 Cal. App. 3d 919, 263 Cal. Rptr. 97 (1989).

226. *Tielsch v. City of Anaheim*, 160 Cal. App. 3d 576, 206 Cal. Rptr. 740 (1984). The same is true of the limitations period for appealing a decision of the Agricultural Labor Relations Board to the court of appeal. *Mario Saikhon, Inc. v. Agricultural Labor Relations Bd.*, 140 Cal. App. 3d 581, 189 Cal. Rptr. 632 (1983). But the contrary is true in workers' compensation cases. *Villa v. Workers' Compensation Appeals Bd.*, 156 Cal. App. 3d 1076, 203 Cal. Rptr. 26 (1984).

227. A sampling of such statutes follows: There is a 90-day limitation period from the date a driver's license order is noticed. Veh. Code § 14401(a). There is a 30-day limitation period after issuance of decisions of the Agricultural Labor Relations Board. Lab. Code § 1160.8. The provision relating to Public Employment Relations Board is similar. Gov't Code § 3542. A six-month period is provided to appeal decisions of the Unemployment Insurance Appeals Board; it runs from date of decision or from the date the decision is designated as a precedent decision, whichever is later. Unemp. Ins. Code § 410. Decisions of the Workers' Compensation Appeals Board must be appealed within 45 days after a petition for reconsideration is denied or (if the petition is granted) 45 days after the filing of an order of reconsideration. Lab. Code § 5950. Welfare decisions of the Department of Social Services can be appealed within one year after notice of decision. Welf. & Inst. Code § 10962. One year is allowed to challenge various state personnel decisions, including decisions of the State Personnel Board, although remedies are limited unless the challenge is made within 90 days. Gov't Code § 19630. Litigants have 90 days to challenge decisions of zoning

Finally, a great deal of state and local agency action is not subject to any special limitation period at all. This includes both adjudicatory action that is not under the APA or Section 1094.6,²²⁸ as well as a vast array of more generalized agency action. In such cases, the limitations period are those provided by general provisions of the Code of Civil Procedure: either the three-year statute for liabilities created by statute²²⁹ or the four-year statute applicable when no other period of limitation applies.²³⁰ Since these limitation periods are far too long for judicial review of agency action,²³¹ courts generally impose shorter limitation periods under the doctrine of laches.²³²

appeal boards (and the board must be served within 120 days of its decision). Gov't Code § 65907.

These statutes contain no provision tolling limitations where the agency is late in delivering the record. Probably the court cannot allow equitable tolling in such cases. *California Standardbred Sires Stakes Comm. v. California Horse Racing Bd.*, 231 Cal. App. 3d 751, 282 Cal. Rptr. 656 (1991); *Sinetos v. Department of Motor Vehicles*, 160 Cal. App. 3d 1172, 207 Cal. Rptr. 207 (1984). *Contra Liberty v. California Coastal Comm'n*, 113 Cal. App. 3d 501, 170 Cal. Rptr. 247 (1981) (statute should be tolled to prevent Commission from perpetrating injustice by holding up preparation of the record).

228. *Monroe v. Trustees of Cal. State Colleges*, 6 Cal. 3d 399, 99 Cal. Rptr. 129 (1971) (refusal to reinstate professor discharged 16 years before for refusal to sign loyalty oath); *Ragan v. City of Hawthorne*, 212 Cal. App. 3d 1368, 261 Cal. Rptr. 219 (1989) (refusal to hold hearing required by APA); *County of San Diego v. Assessment Appeals Bd. No. 2*, 148 Cal. App. 3d 548, 554, 195 Cal. Rptr. 895, 898 (1983) (property tax decision of Appeals Board); *Aroney v. California Horse Racing Bd.*, 145 Cal. App. 3d 928, 193 Cal. Rptr. 708 (1983) (exclusion order from racetrack).

229. Section 338(a); *Green v. Obledo*, 29 Cal. 3d 126, 140 n.10, 172 Cal. Rptr. 206, 214 n.10 (1981) (obligation to pay welfare benefits is liability created by statute).

230. Section 343. See California Administrative Mandamus §§ 7.9-7.10, at 244-46 (Cal. Cont. Ed. Bar, 2d ed. 1989).

231. See *Conti v. Board of Civil Serv. Comm'rs*, 1 Cal. 3d 351, 357 n.3, 82 Cal. Rptr. 337, 340 n.3 (1969); *Aroney v. California Horse Racing Bd.*, 145 Cal. App. 3d at 933, 193 Cal. Rptr. at 710; *Cameron v. Cozens*, 30 Cal. App. 3d 887, 106 Cal. Rptr. 537 (1973).

232. See *Conti v. Board of Civil Serv. Comm'rs*, 1 Cal. 3d 351, 357 n.3, 82 Cal. Rptr. 337, 340 n.3 (1969); 2 G. Ogden, *California Public Agency Practice* §

2. Recommendations

A new statute should provide a single limitation period, at least for all adjudicatory action taken by state or local agencies. This section canvasses some of the policy problems that must be considered in drafting such a provision.

a. When period starts running

The time period provided should run from the effective date of the decision. A petition for judicial review filed before the effective date is premature.²³³

Under the Commission's draft administrative adjudication statute, the effective date of an order is 30 days after the decision becomes final unless the agency head orders a different date.²³⁴ A decision should state the date when it is effective so that parties will have no doubt about when the statute of limitations on review starts running.

The provision that a decision is effective 30 days after it is "final" requires that litigants know when a decision becomes final. The draft administrative adjudication statute contains a number of provisions relating to finality. A proposed decision may be summarily adopted as a final decision within 100 days after it is deliv-

51.11 (1992); California Administrative Mandamus § 7.14, at 248-49 (Cal. Cont. Ed. Bar, 2d ed. 1989).

233. Government Code Section 11523 requires that the petition be filed "within" the 30-day period after the last day on which reconsideration can be ordered. I can see several possible problems here. A litigant might file too early and, not realizing the nature of the error, fail to meet the limitations period by filing anew after the effective date. Therefore, I suggest the prematurely filed petition toll the statute of limitations on seeking judicial review.

Another possible problem might arise where an agency decision states an effective date far in the future (i.e., provides for a very long stay of its order). This would delay the time at which a person can seek judicial review. Existing law permits only very short delays. Gov't Code § 11521(a). If the Commission considers the possibility of deferral of judicial review through a lengthy stay to be a problem, the statute could provide that a petition for judicial review could be filed at any time after the agency could no longer reconsider its decision. But this may be an unnecessary complication.

234. Section 650.110(a) in administrative adjudication draft attached to Memorandum, *supra* note 155. [Ed. note. This provision was not included in the Commission's final recommendation.]

ered to the agency head (or other period provided by regulation). The date of summary adoption would be the date the decision becomes final. The proposed decision also becomes final immediately upon issuance if it is unreviewable or upon a decision by the reviewing authority in the exercise of discretion to deny review. Finally, a proposed decision becomes a final decision 100 days after delivery of the proposed decision to the reviewing authority if the latter takes no action.²³⁵

Under the draft statute, a final decision is treated as final when it is “issued,” although the agency has ten days to serve it on the parties.²³⁶ However, a final decision can still be altered by the agency. Within 15 days following service of a final decision, any party can apply to the agency head to correct a mistake or clerical error in the final decision; the application is deemed denied if the agency head does not dispose of it within 15 days. The agency head also has 15 days to correct a mistake or clerical error on its own motion.²³⁷

Moreover, under the draft statute the agency can give further review to a final decision, either by petition or on its own motion; the power to grant further review to a final decision expires 30 days after service or other time provided by agency regulation.²³⁸

235. See Sections 649.140-649.150 in administrative adjudication draft attached to Memorandum, *supra* note 155. [Ed. note. These provisions were not included in the Commission’s final recommendation.]

236. Section 649.160(a) in administrative adjudication draft attached to Memorandum, *supra* note 155. [Ed. note. This provision was not included in the Commission’s final recommendation.] I am not certain whether the draft defines “issued.” Existing law defines it as the date that a decision is either delivered to the parties or mailed to the parties. See *Sunnyside Nurseries, Inc. v. Agricultural Labor Relations Bd.*, 93 Cal. App. 3d 922, 929, 156 Cal. Rptr. 152, 155 (1979). But see *Mario Saikhon, Inc. v. Agricultural Labor Relations Bd.*, 140 Cal. App. 3d 581, 189 Cal. Rptr. 632 (1983). But that would make no sense since the statute requires the decision to be delivered or mailed ten days after issuance. This provision should be reconsidered.

237. Section 649.170 in administrative adjudication draft attached to Memorandum, *supra* note 155. [Ed. note. This provision was not included in the Commission’s final recommendation.]

238. Sections 649.210-649.220, in administrative adjudication draft attached to Memorandum, *supra* note 155. [Ed. note. These provisions were not included in the Commission’s final recommendation.] The process of giving further

Clearly, once an agency has decided to provide further review of a final decision, that decision becomes unsuitable for judicial review until the agency has issued a new final decision.

These provisions relating to correction of mistakes or review of final decisions make it difficult to know whether an apparently final decision is in fact final. As a result, the judicial review statute of limitations should start running not on the date a decision is final but on its effective date, which is normally 30 days after the decision is final, unless the agency decision provides a different effective date.²³⁹ When the 30-day period after the decision becomes final has expired, it is normally too late for the agency to correct mistakes or clerical errors and too late for it to grant further review of the decision.²⁴⁰ And if the agency states an effective date for its decision that is shorter than 30 days after the decision becomes final, it should be clear from the statute that the agency cannot alter its decision after that effective date.²⁴¹

review to a final decision is often referred to as “reconsideration” under existing law.

239. *Cf.* *United Farm Workers v. Agricultural Labor Relations Bd.*, 74 Cal. App. 3d 347, 141 Cal. Rptr. 437 (1977). The statute relating to the ALRB provided for judicial review within 30 days after issuance of the order. This period could not be extended by seeking reconsideration; the limitation period begins on the date of final order regardless of the pendency of a petition for reconsideration. Under the draft statute, the ALRB could continue to maintain the same rule, if it wished to do so, by causing the effective date of its orders to coincide with the date they are issued and disclaiming any power to reconsider them.

240. This is not quite correct, however, since both the provision for correction of mistakes and for review of a final decision provide that the time periods can be extended by regulation. Where an agency has extended these time periods by regulation, it is important that the agency extend the effective date of a final decision so that it occurs after there is no further possibility of change. If the agency has not done this, it should be clear that a petition for judicial review filed after the effective date cuts off the power of the agency to correct mistakes or grant review of a final decision, even if its regulations allow it to do so. See Section 649.170(f) (in administrative adjudication draft attached to Memorandum, *supra* note 155), which cuts off the power to correct mistakes after initiation of administrative or judicial review.

241. Such a provision should be added to the provisions relating to correction of errors and review of final decisions.

b. The limitation period

I believe that the statute should allow a 90-day limitation period for judicial review of adjudicatory action. The 30-day period in the existing APA seems too short, since persons often are not represented by counsel at the agency level and must secure counsel in order to appeal.²⁴² Section 1094.6 was enacted more recently than Section 11523 (1976 as opposed to 1945) and its 90-day period probably better represents current thinking about the appropriate limitation period.²⁴³ This section would unify a large group of existing statutes that, without any rationale that I can perceive, provide for limitation periods between 30 days and one year.²⁴⁴

I believe that the new 90-day statute should also cover judicial review of an agency decision refusing to hold an adjudicatory hearing required by the APA or other law. Present law places such review under the three-year statute of limitations for actions on a liability created by statute.²⁴⁵ This seems absurd; judicial review of such refusal should come quite quickly after the agency refuses to hold the hearing so that, if plaintiff is successful, the hearing can be held while the facts are still fresh.²⁴⁶

242. For example, see *Kupka v. Board of Admin. of PERS*, 122 Cal. App. 3d 791, 176 Cal. Rptr. 214 (1981) (misunderstanding between petitioner and his attorney allowed 30-day period to slip by — court has no power to relieve default on grounds of mistake, inadvertence, or excusable neglect).

243. See *Hittle v. Santa Barbara County Employees Retirement Ass'n*, 39 Cal. 3d 374, 216 Cal. Rptr. 733 (1985), which held that the 90-day period of Section 1094.6 could not be shortened by local ordinances or retirement plans. The Court stated that as a matter of policy a 90-day period suffices to keep stale claims out of court, but any shorter period might impede the bringing of meritorious actions.

244. See *supra* note 227.

245. *Ragan v. City of Hawthorne*, 212 Cal. App. 3d 1368, 261 Cal. Rptr. 219 (1989). But see *Farmer v. City of Inglewood*, 134 Cal. App. 3d 130, 140-41, 185 Cal. Rptr. 9, 15 (1982), which applies the 90-day statute of Section 1094.6 to a situation in which a hearing was denied; the claim accrued when the hearing should have been granted, but was tolled until the time that the agency finally refused to grant one.

246. As discussed below, the applicable statute of limitations is tolled until an agency notifies a person of the applicable limitations period. In default of such

c. Statute of limitations for judicial review of non-adjudicatory agency action

I have suggested that a uniform 90-day period apply for judicial review of all state and local adjudicatory action. This recommendation applies to all situations (whether or not covered by the new APA) in which an on-the-record hearing is provided, whether required by constitution, statute, regulation, or custom. Generally, these are the actions covered by Section 1094.5 of existing law.²⁴⁷

Should we attempt at this time to prescribe a uniform statute of limitations for all other judicial review of agency action — for the vast array of actions challenged in court that are not adjudicatory in nature? These actions involve both attacks on agency regulations and on the vast array of generalized and individualized actions of agencies that are not required to be taken after provision of a hearing. Normally, judicial review of such actions is obtained through a writ of “traditional” mandamus²⁴⁸ or through declaratory judgment.²⁴⁹ Under present law, the normal statutes of limitation apply — three or four years after the right accrues. This really seems far too long a period of time in which to mount a challenge of agency action. In other situations, specific statutes prescribe time limits.²⁵⁰

I am reluctant to try at this time to prescribe a single limitation period for such a vast array of state and local actions. Perhaps it

notice, the limitations period would be six months after the agency’s final decision to refuse to provide a hearing.

247. Section 1094.5 applies to review of proceedings “in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer....”

248. Section 1085. Traditional or ordinary mandamus applies where the defendant owes a non-discretionary duty to plaintiff (or possibly in cases of abuse of discretion). Judicial review of adjudicatory action under Section 1094.5, although also styled as mandamus, is in fact much more like the traditional writ of certiorari.

249. Section 1060. Judicial review of regulations is obtained through declaratory relief. Gov’t Code § 11350. No statute of limitations is set forth.

250. See, e.g., Pub. Res. Code § 21167 (prescribing various limitation periods for different claims relating to environmental impact statements).

will be possible to do so in connection with a proposal for a single unified judicial review mechanism; I intend to propose one in the next installment of this study.

Just to identify one problem, it would not be good policy to state a uniform 90-day limitation provision for judicial review of regulations, since in many cases people are not even aware of a regulation until long after it has been adopted. Some federal statutes do impose such a limitation on challenging regulations, and they are generally considered as rather Draconian since so many potential challengers of the regulation are certain to be barred by the short limitation period. To name another problem, the vast array of agency actions that would be swept under such a uniform procedure lack commonality, so that it would be difficult to write a statute prescribing exactly when the cause of action accrues.²⁵¹ Thus I will revisit the subject of statutes of limitation for review of other agency actions in the next phase of this study.

d. Extension of time if agency delays providing record

Both generic statutes contain provisions extending the statute of limitations if the agency is slow in providing the record, including the transcript.²⁵² I suggest that a new generalized judicial review section contain a tolling provision of this type. Often, counsel must examine the record in order to decide whether it is sensible to seek judicial review; therefore, the record should be available before the decision to pursue review must be made.

Both generic statutes require that the record be requested within 10 days after the decision becomes final in order to trigger the extension provision. This seems too strict. I suggest that the extension provision be triggered if the request for the record is made

251. See, e.g., *Monroe v. Trustees of Cal. State Colleges*, 6 Cal. 3d 399, 99 Cal. Rptr. 129 (1971) (refusal to reinstate professor discharged 16 years before for refusal to sign loyalty oath — statute starts running from refusal to reinstate, not from initial discharge).

252. However, if the material supplied by the agency omits an item which should have been included, the statute of limitations is not tolled until the missing item is supplied — at least where the petitioner is not prejudiced by the omission. *Compton v. Mount San Antonio Community College Bd. of Trustees*, 49 Cal. App. 3d 150, 122 Cal. Rptr. 493 (1975).

within 30 days after the effective date of the decision. Then the time to seek review would be extended until the later of the following: (1) 90 days after the effective date of the decision or (2) 30 days after the agency supplies the record.

The existing judicial review statutes providing for review in the court of appeal or the Supreme Court, rather than the superior court, contain a different provision relating to the record. The agency must supply the record after the court clerk notifies the agency that a petition for review has been filed.²⁵³ Thus in cases reviewed in the court of appeal or the Supreme Court, the record is not available to a petitioner at the time the decision to seek review is made.²⁵⁴ I am uncertain whether this different pattern is required by the mechanics of appellate practice or whether the statute should make the same provision for cases reviewed in trial courts and appellate courts. Assuming the Commission decides to preserve the existing provisions that lodge appeals from certain agencies in the court of appeal or the Supreme Court,²⁵⁵ it should also decide whether the provisions relating to the record should differ with respect to such appeals.

e. Notice to parties of limitation period

Section 1094.6 requires that the agency decision give notice that the time within which review must be sought is provided by that section.²⁵⁶ Case law holds that such notice is required to start the 90-day period running.²⁵⁷ I think that an agency decision should notify parties of the date by which review must be sought and it

253. See Lab. Code §§ 1160.8 (Agricultural Labor Relations Board), 5951 (Workers' Compensation Appeals Board); Pub. Util. Code § 1756 (Public Utilities Commission).

254. Obviously such statutes contain no tolling provision relating to agency delays in furnishing the record, since the petition must be filed before the record is supplied.

255. The issue of the proper court in which to obtain review will be considered in the next phase of the study.

256. Vehicle Code Section 14401(b) and Unemployment Insurance Code Section 410 require similar notification.

257. *El Dorado Palm Springs, Ltd. v. Rent Review Comm'n*, 230 Cal. App. 3d 335, 281 Cal. Rptr. 327 (1991).

should actually give the date on which the limitation period runs out.²⁵⁸ The present statutes applicable to judicial review of state agency action impose no duty on the agency to warn litigants of the short limitations period on seeking review.²⁵⁹ Such statutes can function as a trap. Litigants who are not represented by counsel (and perhaps even some represented by inexperienced counsel) may inadvertently let the short period slip away.

Absent written notice²⁶⁰ of the limitation period on seeking review, the 90-day statute of limitations should be tolled. However, the applicable limitations period, where no notice of the limitation date was given, should be a reasonable period, say six months after the effective date of the decision. It should not be the three or four year periods provided by the default statutes of limitation.

f. No extension because decision is mailed

In accordance with current law,²⁶¹ the statute should make clear that the limitation periods are not extended because the agency decision is mailed despite the provision in the draft statute that service or notice by mail extends any prescribed period of notice and any right or duty to do an act within a prescribed period.²⁶²

258. The adjudication provisions of the statute should include information about the limitation period among the necessary elements of an agency final decision.

259. See *Elliott v. Contractors' State License Bd.*, 224 Cal. App. 3d 1048, 274 Cal. Rptr. 286 (1990) (licensee wrote Board asking for information about appeal but it failed to respond — such facts do not estop Board from asserting limitations).

260. Case law under Section 1094.6 indicates that the notice can be written or oral. *El Dorado Palm Springs, Ltd. v. Rent Review Comm'n*, 230 Cal. App. 3d 335, 281 Cal. Rptr. 327 (1991). However, I believe that the notice should be written to avoid credibility disputes about whether oral notice was given.

261. *Tielsch v. City of Anaheim*, 160 Cal. App. 3d 576, 206 Cal. Rptr. 740 (1984). The workers' compensation rule is to the contrary. *Villa v. Workers' Compensation Appeals Bd.*, 156 Cal. App. 3d 1076, 203 Cal. Rptr. 26 (1984).

262. Section 613.230, in administrative adjudication draft attached to Memorandum, *supra* note 155. [Ed. note. This provision was not included in the Commission's final recommendation.]

g. Other issues

The revised statute should confirm existing law (perhaps in a comment) that an agency can be estopped to plead the statute of limitations if a failure to seek review within the limitation period was attributable to misconduct of agency employees.²⁶³ And a petition that is timely filed but has a technical defect (whether or not the defect is detected by the court clerk and whether or not the clerk refuses to file the defective petition) should not be dismissed even though the defect is corrected after the limitations period expires.²⁶⁴ If a person is never notified of an agency decision (for example, because it is lost in the mail), a petition for review should be considered timely if filed within a reasonably short period after the person finally receives notice of the decision.²⁶⁵ Finally, if the limitation period ends on a Sunday or holiday, it should be extended until the next following day.²⁶⁶

263. *Gianns v. Savage*, 61 Cal. 2d 520, 39 Cal. Rptr. 377 (1964); California Administrative Mandamus § 7.17, at 251-52 (Cal. Cont. Ed. Bar, 2d ed. 1989). It may be that estoppel is permitted with respect to mandate petitions under Section 1094.5 in the superior court, but not with respect to cases filed in the court of appeal or the Supreme Court, since the time limits in the latter cases are jurisdictional. A late-filing petitioner should be able to assert an estoppel defense regardless of the court in which review is sought.

264. *United Farm Workers v. Agricultural Labor Relations Bd.*, 37 Cal. 3d 912, 210 Cal. Rptr. 453 (1985); California Administrative Mandamus § 7.18, at 252 (Cal. Cont. Ed. Bar, 2d ed. 1989).

265. *State Farm Fire & Casualty Co. v. Workers' Compensation Appeals Bd.*, 119 Cal. App. 3d 193, 173 Cal. Rptr. 778 (1981).

266. *Alford v. Industrial Accident Comm'n*, 28 Cal. 2d 198, 169 P.2d 641 (1946).

THE SCOPE OF JUDICIAL REVIEW OF DECISIONS OF CALIFORNIA ADMINISTRATIVE AGENCIES

Michael Asimow*

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* Professor of Law, UCLA Law School. The author is a consultant to the California Law Revision Commission in its project to adopt a new California Administrative Procedure Act that would refashion California administrative adjudication and judicial review. The Commission has not completed its work, and all of the conclusions in this article are mine alone, not those of the staff or members of the Commission. I am grateful for the assistance provided by Daniel Asimow, Karl Engeman, William Funk, Ronald Levin, Gregory Ogden, Daniel Siegel, Gary Schwartz, and Robert Sullivan, and by faculty workshops at UCLA, Duke, and William and Mary Law Schools. Special thanks go to my research assistant Diana Ponce-Gomez for her dedicated assistance. I also wish to acknowledge the wise counsel I received from the members of the Law Revision Commission and the unflagging efforts of the Commission's staff, particularly Nat Sterling and Bob Murphy. Of course, responsibility for any errors is mine.

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INTRODUCTION

The scope of judicial review of the decisions of administrative agencies is a vitally important and highly controversial subject in administrative law. The doctrines that fix the scope of review define the court's checking power over the actions of administrative agencies. As a consequence, these doctrines mark out the boundaries between judicial and administrative authority. If the line is placed in a way that favors agencies too much, the vital principle of judicial check will be sacrificed. But if it is placed in a way that favors courts too much, agencies will be unable to carry out their regulatory roles and judges will expend excessive resources on the reviewing function.

There has never been consensus among the various participants in the judicial review process about where the boundaries should lie. The enormous number of state and federal cases and statutes and the vast commentary on the scope of review issue have generated a bewildering variety of tests and standards. However, assuming an administrative decision is reviewable, the choices can be reduced to two: Either a court has the power or does not have the power to substitute its judgment for the rational judgment of agency decisionmakers with whom the court disagrees. Thus, the basic question is which of two rational views should prevail—that of agency heads or of judges. One choice allows substitution of judicial judgment. The second requires the court to accept a rational agency decision. Within those two broad categories, of course, there is ample room for more or less intensive review. Nevertheless, the fundamental choice is which of the two approaches should be employed.

This Article surveys existing California law as well as federal law, the law of other states, and Model Acts. It offers recommendations with respect to the scope of judicial review of administrative decisions that resolve issues of fact (Part I), law (Part II), applications of law to fact (Part

III), discretion and policy (Part IV), and procedure (Part V). I argue that California courts should have power to substitute judgment with respect to questions of law, applications of law to fact, and procedure, but that courts must accept rational agency judgments with respect to questions of fact, discretion, and policy.

This Article chooses between alternative schemes of review by assessing the schemes in light of the following fundamental policies and values.¹

a. Accuracy. The judicial review system should be designed to achieve accurate and appropriate results. This means that judicial review should make it more rather than less likely that the ultimate decision in a case is factually correct, rational, and consistent with applicable statutes and the public interest.² Achieving accurate decisions means respecting the varying expertise and intellectual capabilities of agency decisionmakers and of judges. It also means striving to achieve uniformity of results across similar cases.

b. Efficiency. The judicial review system should be administratively efficient, meaning that it should conclude cases rapidly at least cost to the parties and to the judicial system. It must respect the limited resources of the California courts. It should avoid doctrines that are difficult to administer judicially, in order to discourage costly litigation over peripheral issues. Finally, scope of review law should seek to avoid sharp distinctions (referred to herein as "on-off switches") that hinge large differences in judicial methodology on whether a particular case falls on one side of an amorphous line or the other. Such distinctions are difficult and costly to administer and encourage litigation.

c. Acceptability. The parties to judicial review should believe they have been dealt with fairly. For this purpose, parties include private litigants, agencies, and the general public.

d. Political Theory and Separation of Powers. The judicial review system should honor legislative intention about whether responsibility for particu-

1. Similar methodologies are suggested in John R. Allison, *Combinations of Decision-Making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis*, 1993 UTAH L. REV. 1135, 1146-55; Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. REV. 1067, 1081 (1992); Roger C. Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 591-93 (1972); Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 279-93 (1978).

2. See Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 380-81 (1994) (importance of reaching accurate outcomes in cases involving future conduct).

lar judgments should be lodged in courts or agencies. The system should provide an adequate check against administrative error or overreaching, but it should also protect agency autonomy, prevent inappropriate judicial second-guessing of agency policy judgments, and avoid undermining law enforcement.

As I hope to show, existing California law falls far short of an optimal balance of these objectives, whether we consider the judicial review of agency determinations of fact, law, applications of law to fact, discretion, or procedure. Nevertheless, candor requires the admission that reformulation of the judicial review tests will not solve all the problems. Even if all of the suggestions in this Article were adopted, the subject of scope of review will remain troublesome, and courts and litigants will remain uncertain exactly how far reviewing courts can and should intrude on agency discretion. Inevitably, weasel words like "substantial," "reasonableness," "rationality," "deference," or "contextual" appear in the equations. Justice Frankfurter's treatment of the inherent intractability of the subject bears repeating:

A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application. Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry. It cannot be too often repeated that judges are not automata. . . .

Since the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words, new formulas attempting to rephrase the old are not likely to be more helpful than the old. There are no talismanic words that can avoid the process of judgment. The difficulty is that we cannot escape, in relation to this problem, the use of undefined defining terms.³

I. JUDICIAL REVIEW OF AGENCY FACT FINDINGS IN FORMAL ADJUDICATION

A. Introduction

In California (but not elsewhere), the single most controversial issue concerns the scope of judicial review of agency findings of basic fact in

3. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488-89 (1951).

formal adjudications. California law often requires a reviewing court to exercise "independent judgment." This means that the court substitutes its judgment for the agency's regarding the basic facts—what happened, when, and why—even though the agency's contrary conclusions are reasonable.⁴ The effect of independent judgment is that the trial judge need not and usually does not defer to the fact findings of the administrative law judge ("ALJ") or the agency heads. Whether to preserve independent judgment is a difficult and contentious problem.

Perhaps an example will be helpful. Suppose Ace is a Certified Public Accountant. He was responsible for an audit of a public company and failed to detect management fraud. After an investigation, the State Board of Accountancy concludes that it has probable cause to proceed against Ace for violation of statutory standards of ethics and competence. A formal administrative hearing ensues before an ALJ assigned by the Office of Administrative Hearings ("OAH"), California's central panel.⁵ The ALJ is independent of the Accountancy Board and hears cases brought by many different agencies.

At the hearing, there is a clash of expert witnesses. Ace's witnesses explain the failure to detect the fraud as the inevitable outcome of the sampling techniques prescribed by applicable auditing protocols. The Board's witnesses attribute the failure to detect the fraud as attributable to gross negligence and failure to observe the protocols. There are also credibility issues; Ace says he performed certain tests, but other witnesses say he did not perform them. The ALJ's proposed decision comes down on the side of the Board and recommends a disciplinary sanction, such as revoca-

4. The court makes this determination on the administrative record, not after a *de novo* trial. In narrowly limited situations, new evidence can be introduced in court. See CAL. CIV. PROC. CODE § 1094.5(e) (West 1980 & Supp. 1995), discussed *infra* notes 25–29.

5. See Asimow, *supra* note 1, at 1181–83.

tion of Ace's certificate. The heads of the Accountancy Board adopt the ALJ's decision.⁶

Ace then takes the matter to superior court, seeking a writ of administrative mandamus under California Code of Civil Procedure section 1094.5.⁷ The trial judge exercises independent judgment over the facts, meaning that the decisions of the ALJ and the agency heads *count for nothing*. The trial judge is perfectly free to make her own findings about credibility as well as about matters covered by expert testimony. Although the judge finds the case to be close, she grants the writ. The case is over because the appellate court's scope of review of trial court fact findings in independent judgment cases is very circumscribed.⁸

The independent judgment approach is idiosyncratic to California. It is not followed by *any other state* or the federal government. Under the Administrative Procedure Act ("APA"), federal courts employ the test of substantial evidence on the whole record.⁹ The substantial evidence test requires a court to uphold reasonable agency fact-findings even if the court disagrees with them.¹⁰ Most states do the same.¹¹ Under the substantial evidence test, there is little doubt that the Accountancy Board's fact findings in Ace's case would be affirmed because the case was close and the Board's version was well supported by expert testimony. Some states use the clearly erroneous test, which is generally understood to give the court

6. In the vast majority of cases, the ALJ's proposed decision is adopted by the agency heads without any further proceedings. See *infra* note 42. However, the agency heads can reject the proposed decision and substitute their own. See Asimow, *supra* note 1, at 1111-13.

7. See *infra* text accompanying notes 25-27.

8. See *infra* text accompanying notes 37-39.

9. Administrative Procedure Act § 10(e), 5 U.S.C. § 706(2)(E) (1988).

10. Universal Camera Corp. v. NLRB, 340 U.S. 474, 486-91 (1951).

11. William A. McGrath et al., Project, *State Judicial Review of Administrative Action*, 43 ADMIN. L. REV. 571, 753-56 (1991).

somewhat greater power over factfindings than the substantial evidence test.¹² California's independent judgment test stands alone.¹³

B. California's Independent Judgment Test

1. History of Independent Judgment Test—*Standard Oil* Decision and Its Progeny

Prior to 1936, adjudicatory (or "quasi-judicial") action of both state and local government was routinely reviewed in California through the common law writ of certiorari.¹⁴ Under certiorari, the reviewing court examined the record of the adjudicatory decision; among the questions considered was whether the order was supported by evidence.¹⁵ The court used independent judgment to review questions of law and procedure.

The California Supreme Court's 1936 decision in *Standard Oil Co. v. State Board of Equalization*¹⁶ held that the Board could not constitutionally exercise judicial power by deciding questions of law or fact in tax cases.¹⁷

12. See, for example, section 15(g)(5) of the 1961 Model State Administrative Procedure Act which prescribes the "clearly erroneous" standard and was adopted by many states. MODEL STATE ADMINISTRATIVE PROCEDURE ACT OF 1961 § 15(g)(5), 15 U.L.A. 147, 301 (1990). The clearly erroneous test probably gives courts greater review power than does the substantial evidence test. See *infra* text accompanying notes 56–65.

13. Some states utilize independent judgment for particular situations. See, e.g., *Weeks v. Personnel Bd. of Review*, 373 A.2d 176 (R.I. 1977) (discharge of police officer). The Texas APA calls for substantial evidence review, but the decisions of some non-APA agencies are reviewed by a trial de novo—for the purpose of deciding whether there was substantial evidence for the agency decision! Workers' compensation cases are tried completely de novo. See James R. Eissinger, *Judicial Review of Findings of Fact in Contested Cases Under APTRA*, 42 BAYLOR L. REV. 1, 11 (1990).

Missouri employs a peculiar bifurcated standard: substantial evidence where fact finding involves administrative discretion but independent judgment where the agency only applied the law to the facts. MO. REV. STAT. § 536.140.2 (1990). Missouri is not comparable to other states, however, since agency adjudicatory decisions are made by an administrative court rather than by agency heads. See Asimow, *supra* note 1, at 1156 n.310.

14. Certiorari is called the "writ of review" in California. CAL. CIV. PROC. CODE § 1067 (West 1980).

15. *Lanterman v. Anderson*, 36 Cal. App. 472, 172 P. 625 (1918) (order should be affirmed unless there is entire want of evidence supporting it). *Lanterman* was approved in *Suckow v. Alderson*, 182 Cal. 247, 187 P. 965 (1920). See Lincoln Rode, Comment, *Administrative Adjudication in California and Its Review by the Writ of Certiorari*, 25 CAL. L. REV. 694, 698–99, 705–06 (1937).

16. 6 Cal. 2d 557, 59 P.2d 119 (1936).

17. The Court held that this rule was inapplicable to decisions of local government and decisions of statewide agencies of constitutional status since they could legitimately exercise judicial power. *Id.* at 561–63, 59 P.2d at 120–22.

It followed that the Board's adjudicatory decisions could not be reviewed by certiorari, since that writ applied only to the review of judicial action.

The *Standard Oil* decision was deeply rooted in the Court's distrust of new and suspect administrative agencies.¹⁸ Ironically, *Standard Oil* stripped the courts of any mechanism for reviewing agency adjudicatory decisions,¹⁹ thus increasing the potential for tyrannical administrative decisions.²⁰ Ultimately, the Court settled on mandamus as a substitute for certiorari.²¹ Its theory was that an agency's failure to make findings in accordance with the evidence is an abuse of discretion, and mandamus had long been used to correct governmental abuse of discretion. Moreover, in administrative mandamus cases, trial courts must exercise independent judgment on the evidence.²² In short order, the Court backtracked.

18. See B. Abbott Goldberg, *The Constitutionality of Code of Civil Procedure Section 1094.5(d): Effluvia from an Old Fountainhead of Corruption*, 11 PAC. L.J. 1, 6 (1979) (citing studies that so analyze *Standard Oil* and its progeny).

19. In the *Standard Oil* case itself, the taxpayer could have obtained review by paying the tax and suing for a refund. Such second chances were not available in other administrative orders.

20. *Standard Oil's* rigid application of separation of powers and due process set off a torrent of academic criticism and ridicule. See, e.g., 3 KENNETH C. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 24.03, at 412-15 (1958); Sam Walker, *Judicially Created Uncertainty: The Past, Present, and Future of the California Writ of Administrative Mandamus*, 24 U.C. DAVIS L. REV. 783 (1991); Goldberg, *supra* note 18; Victor S. Netterville, *Judicial Review: The "Independent Judgment" Anomaly*, 44 CAL. L. REV. 262 (1956); Lowell Turrentine, *Restore Certiorari to Review State-Wide Administrative Bodies in California*, 29 CAL. L. REV. 275 (1941); D.O. McGovney, *Administrative Decisions and Court Review Thereof*, in *California*, 29 CAL. L. REV. 110 (1941); Ken Hahus, Comment, *A Proposal for a Single Uniform Substantial Evidence Rule in Review of Administrative Decisions*, 12 PAC. L.J. 41 (1980). Judicial criticism in dissenting opinions by Chief Justices Gibson and Traynor and Justices Burke and Clark, among others, was no less severe. See *Strumsky v. San Diego County Employees Retirement Ass'n*, 11 Cal. 3d 28, 46, 112 Cal. Rptr. 805, 817 (Burke, J., dissenting) (1974); *Bixby v. Pierno*, 4 Cal. 3d 130, 151, 93 Cal. Rptr. 234, 249 (1971) (Burke, J., concurring); *Moran v. State Board of Medical Examiners*, 32 Cal. 2d 301, 315, 196 P.2d 20, 29 (1948) (Traynor, J., dissenting); *Dare v. Board of Medical Examiners*, 21 Cal. 2d 790, 803, 136 P.2d 304, 311 (1943) (Traynor, J., concurring in part and dissenting in part); *Laisne v. State Bd. of Optometry*, 19 Cal. 2d 831, 848, 123 P.2d 457, 467-78 (1942) (Gibson, J., dissenting).

21. CAL. CIV. PROC. CODE § 1085 (West 1980); *Drummev v. State Bd. of Funeral Directors*, 13 Cal. 2d 75, 87 P.2d 848 (1939). Prohibition did not work because, like certiorari, prohibition lies only to review judicial action. *Whitten v. State Bd. of Optometry*, 8 Cal. 2d 444, 65 P.2d 1296 (1937).

22. *Drummev*, 13 Cal. 2d at 79-80, 87 P.2d at 851. The Court was influenced by some then recent (but now discredited) U.S. Supreme Court cases indicating that separation of powers or due process required reviewing courts to exercise independent judgment of certain factual questions. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936) (whether rates set by agency are confiscatory); *Crowell v. Benson*, 285 U.S. 22 (1932) (certain issues in federal workers' compensation); *Ng Fung Ho v. White*, 259 U.S. 276 (1922) (citizenship in deportation case); *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920) (whether utility rates are confiscatory). None of these cases even remotely suggested that due process required judicial de

Agency decisions *denying* applications for licenses were reviewed under the substantial evidence test, while decisions *revoking* professional licenses remained under independent judgment.²³ Furthermore, in administrative mandamus cases, the trial court should conduct its review on the administrative record with only limited ability to introduce additional evidence.²⁴

2. The Enactment of Section 1094.5

The Judicial Council's 1944 study that led to the enactment of California's Administrative Procedure Act²⁵ confronted the disarray left in the wake of *Standard Oil*. Because that case appeared to be constitutionally based, the Judicial Council could not recommend returning to the pre-1936 practice of reviewing adjudicatory decisions through certiorari.²⁶ Thus the Council proposed codification of administrative mandamus. Code of Civil Procedure section 1094.5 was enacted in the form that the Council suggested and, with only minor changes, remains in that form today.

Section 1094.5 provides for review of formal adjudicatory decisions by a superior court judge without a jury on the record made before the agency.²⁷ The court considers whether the agency proceeded in excess of

novo trials for factual determinations in licensing cases. These cases have all been disapproved by later decisions and have no current importance. See 3 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 17.9, at 158-59 (3d ed. 1994). The one exception is that a true trial de novo is still required to resolve the question of whether a deportee is a citizen. *Agosto v. INS*, 436 U.S. 748, 753 (1978).

23. See *McDonough v. Goodcell*, 13 Cal. 2d 741, 91 P.2d 1035 (1939). For a vivid description of the background of *McDonough* and the reason why the Supreme Court wanted a reviewing court to defer to the agency in that case, see Goldberg, *supra* note 18, at 31-33.

24. *Dare v. Board of Medical Examiners*, 21 Cal. 2d 790, 799-800, 136 P.2d 304, 309-10 (1943), *overruling Laisne v. State Bd. of Optometry*, 19 Cal. 2d 831, 123 P.2d 457 (1942) (trial de novo required in the case of revocation of professional license). According to *Dare*, new evidence could be introduced if (i) the board had excluded admissible evidence, (ii) the evidence could not with reasonable diligence have been introduced before the agency, or (iii) credibility is in issue, in which case impeaching evidence could be offered. *Dare* was a 4-3 decision. Justice Traynor's devastating dissent pointed out that the procedure designed by the majority had certain elements of certiorari, certain elements of a motion for a new trial, and no elements at all of mandamus. *Dare*, 21 Cal. 2d at 803, 136 P.2d at 311.

25. JUDICIAL COUNCIL OF CALIFORNIA, TENTH BIENNIAL REPORT TO THE GOVERNOR AND THE LEGISLATURE 26-28, 133-45 (1944) (hereinafter JUDICIAL COUNCIL). For discussion of the Judicial Council's landmark report, see Asimow, *supra* note 1, at 1071-72.

26. The Council's approving discussion of the report of the U.S. Attorney General's Committee on Administrative Procedure makes clear that the Council favored the substantial evidence test as opposed to independent judgment. JUDICIAL COUNCIL, *supra* note 25, at 147-51.

27. Under Section 1094.5, the court usually decides the case entirely on the written record. If there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or was improperly excluded before the agency, the court can remand the case to be reconsidered in light of such evidence. Where the court exercises independent judgment, it may

jurisdiction, whether there was a fair trial, and whether there was any prejudicial abuse of discretion. According to Section 1094.5(b), "[a]buse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."²⁸

The Judicial Council was unable to formulate a standard to identify the cases in which the court must exercise independent judgment. Thus Section 1094.5(c) reads:

Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.²⁹

Thus the legislature left it to the courts to mark out the circle within which the independent judgment rule would apply.

3. Judicial Process Under the Independent Judgment Test

The judicial process inherent in an independent judgment case is totally different from the process in a substantial evidence case.³⁰ The substantial evidence test requires a trial court judge to start with the agency's findings of fact. The judge considers the evidence both supporting and opposing the agency's conclusions³¹ and affirms if a reasonable person could have arrived at the same findings as did the agency.³² Although it

admit such evidence without remanding to the agency. CAL. CIV. PROC. CODE § 1094.5(e) (West 1980 & Supp. 1995).

28. CAL. CIV. PROC. CODE § 1094.5(b) (West 1980 & Supp. 1995).

29. *Id.* § 1094.5(c) (West 1980 & Supp. 1995) (emphasis added).

30. Trial courts sometimes acknowledge that the result differs depending on which test is employed. See *Frink v. Prod.*, 31 Cal. 3d 166, 169, 181 Cal. Rptr. 893, 894 (1982) (trial judge stated that weight of evidence was in petitioner's favor but substantial evidence supported decision of the agency); *Quintana v. Board of Admin.*, 54 Cal. App. 3d 1018, 1021, 127 Cal. Rptr. 11, 13 (1976) (same).

31. The court must look at evidence on both sides when conducting substantial evidence review. *Bixby v. Pierno*, 4 Cal. 3d 130, 143 n.10, 144, 149 n.22, 93 Cal. Rptr. 234, 243 n.10, 244, 248 n.22 (1971), approving *LeVesque v. Workmen's Compensation Appeals Bd.*, 1 Cal. 3d 627, 83 Cal. Rptr. 208 (1970).

32. Under federal law, the test means: "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

is deferential, substantial evidence is not a rubber-stamp or toothless standard.³³

Under independent judgment, the trial court makes its own fact findings from the evidence in the record.³⁴ It need not give any deference to the findings of the agency or the ALJ, even as to the credibility of witnesses.³⁵ The court simply decides the case as if the administrative law judge and the agency heads did not exist (except for the purpose of holding a hearing and making a transcript). An agency need not even make findings, since the only findings that count are those of the trial court.³⁶

Another critical difference between independent judgment and substantial evidence lies in the function of appellate courts. If the trial court exercised independent judgment, the appellate court must affirm if there was substantial evidence supporting the *trial court's* decision.³⁷ This is

33. See *infra* text accompanying notes 68-72. Typical formulations by California courts of the meaning of substantial evidence include: "a solid, reasonable and credible showing" and "of ponderable legal significance . . . reasonable in nature, credible, and of solid value." Department of Parks v. State Personnel Bd., 233 Cal. App. 3d 813, 830, 284 Cal. Rptr. 839, 849 (1991).

34. The independent judgment test also applies in many but not all cases of so-called ultimate or "mixed" or "application" questions (i.e. whether the facts fit a statutory standard) where such questions are treated as factual rather than legal. See *infra* Part III.

35. Bassett Unified Sch. Dist. v. Commission on Professional Competence, 201 Cal. App. 3d 1444, 1451, 247 Cal. Rptr. 865, 869 (1988) (trial court should make its own determination of the credibility of witnesses). There is a contrary view on this issue: The trial court should leave credibility questions to the ALJ or the agency heads. E.g., Mullen v. Department of Real Estate, 204 Cal. App. 3d 295, 301, 251 Cal. Rptr. 12, 15 (1988); Arenstein v. Board of Pharmacy, 265 Cal. App. 2d 179, 188, 71 Cal. Rptr. 357, 363 (1968); see also Netterville, *supra* note 20, at 280-85.

Some authority indicates that a presumption of correctness attaches to agency decisions reviewed under independent judgment. Dare v. Board of Medical Examiners, 21 Cal. 2d 790, 798, 136 P.2d 304, 308-09 (1943). However, it is difficult to reconcile such a presumption with the independent judgment test. In practice, it appears that the Dare presumption is ignored. See Ralph N. Kleps, *Certiorarified Mandamus Reviewed: The Courts and California Administrative Decisions-1949-1959*, 12 STAN. L. REV. 554, 577 (1960).

36. See Cooper v. Kizer, 230 Cal. App. 3d 1291, 1299-1300, 282 Cal. Rptr. 492, 496 (1991); Guymon v. Board of Accountancy, 55 Cal. App. 3d 1010, 1015, 128 Cal. Rptr. 137, 140 (1976) ("California fixes responsibility for factual determination at the trial court rather than the administrative agency tier of the pyramid as a matter of public policy."). But see American Funeral Concepts v. California State Bd. of Funeral Directors & Embalmers, 136 Cal. App. 3d 303, 310, 186 Cal. Rptr. 196, 199-200 (1982) (trial court cannot cure agency's failure to make proper findings).

37. The scope of review is the same as when an appellate court reviews a jury's verdict. Yakov v. Board of Medical Examiners, 68 Cal. 2d 67, 72, 64 Cal. Rptr. 785, 789 (1968); Moran v. State Bd. of Medical Examiners, 32 Cal. 2d 301, 308-09, 196 P.2d 20, 25 (1948).

intended to be, and is in practice, a standard which makes reversal on factual grounds unlikely in independent judgment cases.³⁸

In substantial evidence cases, however, an appellate court does exactly what the trial court did—examine the *administrative* record to see whether there was substantial evidence for the *agency's* decision. Here the appellate court's review power is the same as that of the trial court.³⁹ The appellate court in a substantial evidence case must be deferential to the agency—not to the trial court. The difference is subtle but important: An appellate court has much less power in reviewing the decision of a trial court that exercises independent judgment than in reviewing the decision of a trial court that reviews a decision under the substantial evidence test.

4. Removal of the Constitutional Basis for the Independent Judgment Test

In the *Tex-Cal* decision,⁴⁰ the Supreme Court upheld the constitutionality of a statute requiring courts to use the substantial evidence test in

38.

[A]n appellate court must resolve all conflicts in favor of the party prevailing in the superior court and must give that party the benefit of every reasonable inference in support of the judgment. When more than one inference can be reasonably deduced from the facts, the appellate court cannot substitute its deductions for those of the superior court.

Pasadena Unified Sch. Dist. v. Commission on Professional Competence, 20 Cal. 3d 309, 314, 142 Cal. Rptr. 439, 441–42 (1977). "The appellate court's review of the superior court judge's gleanings from the administrative transcript is just as circumscribed as its review of a jury verdict or a judge-made finding after a conventional trial . . ." *Lacy v. California Unemployment Ins. Appeals Bd.*, 17 Cal. App. 3d 1128, 1134, 95 Cal. Rptr. 566, 569 (1971). *Moran* "enthrones each superior court judge as the practical arbiter of the facts and restricts appellate courts to a role more appropriate to the review of jury verdicts in automobile collision cases." *Id.* at 1135 n.2, 95 Cal. Rptr. at 570 n.2.

39. See, e.g., *Rasmussen v. City Council of Tiburon*, 140 Cal. App. 3d 842, 849, 190 Cal. Rptr. 1, 4–5 (1983).

40. *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.*, 24 Cal. 3d 335, 156 Cal. Rptr. 1 (1979). Two justices (Manuel and Mosk) concurred fully in Justice Newman's majority opinion. Justice Tobriner concurred in the judgment and Justices Richardson and Taylor concurred in the result. These justices did not explain their reservations. Dissenting on another issue, Justice Clark concurred in "the conclusions reached by the majority opinion." *Id.* at 356, 156 Cal. Rptr. at 14 (Clark, J., concurring in part and dissenting in part). In a later case, Justice Clark made clear that he concurred in the majority's conclusion on the scope of review issue. *Interstate Brands v. Unemployment Ins. Appeals Bd.*, 26 Cal. 3d 770, 783 n.1, 163 Cal. Rptr. 619, 627 n.1 (1980) (Clark, J., concurring). The *Tex-Cal* holding that the legislature could mandate substantial evidence review for any agency was reiterated in *Frink v. Prod.*, 31 Cal. 3d 166, 173, 181 Cal. Rptr. 893, 896 (1982).

cases arising under the Agricultural Labor Relations Act. *Tex-Cal* thus holds that the independent judgment test is not constitutionally based so the legislature or the courts themselves could abolish it.⁴¹ Provided that the agency provides administrative due process, substantial evidence review is acceptable, even though an aggrieved party is deprived of a fundamental vested right. This decision knocks the props from under the *Standard Oil* decision and its progeny.⁴²

As a result of *Tex-Cal*, the way is open for the courts or the legislature to design a modern instrument for judicial review of adjudicatory action and to either abolish the independent judgment test or shrink the circle of cases to which it applies.

5. Policy Rationale for Independent Judgment

The courts have adhered to independent judgment as a matter of policy, even though the test is no longer constitutionally based. In *Bixby v. Pierno*,⁴³ Justice Tobriner articulated the policies behind independent judgment, speaking of the possible capture of government agencies by powerful economic forces.

41. *Tex-Cal*, 24 Cal. 3d at 344-46, 156 Cal. Rptr. at 5-7.

42. *McHugh v. Santa Monica Rent Control Bd.*, 49 Cal. 3d 348, 374-75, 261 Cal. Rptr. 318, 335-36 (1989), upheld a local agency's power to order restitutive damages if it is subject to the "principle of check" by appropriate judicial review. Thus *McHugh* continues the trend evidenced by *Tex-Cal* of flexible application of the judicial power provision of the California Constitution.

McHugh approved numerous sister-state cases which authorize substantial evidence review of agency decisions awarding damages. Nevertheless, the court observed that independent judgment may be the "appropriate standard for a court to apply in reviewing the administrative determination," given that "a private party has a 'direct pecuniary interest' in the agency's determination." *Id.* at 375 n.36, 261 Cal. Rptr. at 335 n.36. This footnote simply applies existing law which calls for independent judgment review of decisions requiring the payment of money. See *infra* text accompanying note 51. It should not be read as holding that independent judgment review is constitutionally required in such cases.

Hensler v. City of Glendale, 8 Cal. 4th 1, 22-25, 32 Cal. Rptr. 2d 244, 258-60 (1994), holds that independent judgment is required where a landowner alleges that local land use regulation effected a regulatory taking of his property. Only a court, not an agency, is empowered to determine whether a taking has occurred; therefore independent judgment must be available. Although the landowner must exhaust administrative remedies and seek relief under Section 1094.5, the action for administrative mandamus can be joined with an action for inverse condemnation in which a jury trial on valuation is available. *Hensler* seems limited to the inverse condemnation situation and has no applicability to ordinary judicial review of agency action.

43. 4 Cal. 3d 130, 93 Cal. Rptr. 234 (1971). The *Bixby* discussion is all dictum; the holding of the case was that substantial evidence, not independent judgment, applied to judicial review of the approval by the Corporations Commissioner of a corporate reorganization.

Although we recognize that the California rule yields no fixed formula and guarantees no predictably exact ruling in each case, it performs a precious function in the protection of the rights of the individual. Too often the independent thinker or crusader is subjected to the retaliation of the professional or trade group; the centripetal pressure toward conformity will often destroy the advocate of reform. The unpopular protestant may well provoke an aroused zeal of scrutiny by the licensing body that finds trivial grounds for license revocation. Restricted to the narrow ground of review of the evidence and denied the power of an independent analysis, the court might well be unable to save the unpopular professional or practitioner. Before his license is revoked, such an individual, who walks in the shadow of the governmental monoliths, deserves the protection of a full and independent judicial hearing.⁴⁴

Nevertheless, there have always been strong opposing views about the policy merits of the independent judgment test. These views have been forcefully and repeatedly expressed both in the literature and in Supreme Court dissents, particularly by Chief Justices Gibson and Traynor and Justice Burke.⁴⁵ In a later section, I will evaluate the policy arguments for and against independent judgment.

6. Vested Fundamental Rights Protected by the Independent Judgment Test

Standard Oil covered only nonconstitutional state agencies. Therefore, independent judgment has never applied to agencies established by the California constitution since these agencies could exercise judicial power.⁴⁶ Even though the independent judgment test is now a matter of

44. *Id.* at 146-47, 93 Cal. Rptr. at 245-6. In equally stirring rhetoric, the Court concluded: At a time in this technocratic society when the individual faces ever greater danger from the dominance of government and other institutions wielding governmental power, we hesitate to strip him of a recognized protection against the overreaching of the state. The loss of judicial review of a ruling of an administrative agency that abrogates a fundamental vested right would mark a sorry retreat from bulwarks laboriously built. Such an elimination would not only overrule decisions long held in California, but destroy a bed-rock procedural protection against the exertion of arbitrary power.

Id. at 151, 93 Cal. Rptr. at 249.

45. See *supra* note 20.

46. Thus, for example, decisions of the Workers' Compensation Appeals Board, State Personnel Board, Regents of the University of California, Alcoholic Beverage Control Appeals Board, and Public Utilities Commission could be reviewed under the substantial evidence test or any other test that the legislature might prescribe.

policy rather than constitutional law, the decisions of constitutional agencies continue to be reviewed under the substantial evidence test. It is illogical that different standards apply to review of decisions by statewide constitutional agencies, since their decisions affect fundamental rights quite as often as those of nonconstitutional statewide agencies.⁴⁷ Similarly, *Standard Oil* did not cover review of the decisions by local government adjudicatory agencies. In 1974, however, the Court expanded independent judgment to cover such decisions.⁴⁸ While this move might have been justifiable since local governments sometimes furnish inadequate adjudicatory procedures,⁴⁹ it caused confusion since local land use and environmental decisionmaking is quite different from typical state decisions.

What then are the "fundamental vested rights" to which the independent judgment test now applies? Early cases focussed on "vestedness," so that independent judgment applied to decisions taking away property rights (licenses or money), but not to decisions denying applications. In *Bixby*, the Court changed the emphasis to "fundamentalness," ruling that independent judgment applied to "fundamental vested rights" and making the

47. Decisions of the State Personnel Board and of the Regents of the University of California are reviewed under substantial evidence since these agencies are constitutional, but personnel decisions of local government or of the California State University and College system are reviewed under independent judgment. *Skelly v. State Personnel Bd.*, 15 Cal. 3d 194, 217 n.31, 124 Cal. Rptr. 14, 30 n.31 (1975); *Webster v. Trustees of Cal. State Univ.*, 19 Cal. App. 4th 1456, 24 Cal. Rptr. 2d 150 (1993); *Richardson v. Board of Supervisors*, 203 Cal. App. 3d 486, 493, 250 Cal. Rptr. 1, 4 (1988).

Further irrational distinctions are abundant. Fact findings in ratemaking decisions of the Public Utilities Commission are final and unreviewable (including findings of ultimate fact and findings of reasonableness) except in constitutional cases. CAL. PUB. UTIL. CODE §§ 1757, 1760 (West 1994). In ironic contrast, ratemaking decisions of the Insurance Commissioner are reviewable under the independent judgment test. CAL. INS. CODE §§ 1858.6, 1861.09 (West 1993).

Decisions of the Workers' Compensation Appeals Board as to whether an employee is disabled are reviewed under substantial evidence, but disability decisions of the Board of Administration of the Public Employees' Retirement System are reviewed under independent judgment. *Quintana v. Board of Admin.*, 54 Cal. App. 3d 1018, 127 Cal. Rptr. 11 (1976).

48. *Strumsky v. San Diego County Employees Retirement Ass'n*, 11 Cal. 3d 28, 112 Cal. Rptr. 805 (1974) (state and local agencies stand on same constitutional footing insofar as legislature's ability to delegate judicial power).

49. The Court also required independent review of decisions of some private organizations such as private hospitals. These too might provide inadequate procedural protection and the impartiality of their decisionmakers is often questionable. *Anton v. San Antonio Community Hosp.*, 19 Cal. 3d 802, 820-25, 140 Cal. Rptr. 442, 452-455 (1977) (private hospital decision to exclude doctor from staff— independent judgment review). *Anton* was overruled by CAL. CIV. PROC. CODE § 1094.5(d) (West 1980 & Supp. 1995), requiring substantial evidence review of decisions by private hospital boards except in a few situations. The story of Section 1094.5(d) is well told in the article by retired judge B. Abbott Goldberg cited *supra* at note 18.

degree of vestedness a factor in deciding fundamentalness.⁵⁰ *Bixby* left prior case law intact, so that a "direct pecuniary impact" still triggers independent judgment. This means that an agency decision requiring someone to write a check triggers independent judgment, even though the payor is a large business or even a government agency that could not plausibly meet the "fundamentalness" standard.⁵¹

After *Bixby* reconceptualized the doctrine, independent judgment began to spread inexorably from its roots in professional license revocation cases. In *Bixby*, the court made the intuitive nature of the "fundamentalness" inquiry explicit. The coverage of independent judgment has been prescribed on a case-by-case basis; the courts attempt to reason from prior precedents, expanding them where necessary to cover an interest that strikes them (or a majority of them) as "fundamental":

[T]he courts in this case-by-case analysis consider the nature of the right of the individual: whether it is a fundamental and basic one, which will suffer substantial interference by the action of the administrative agency, and, if it is such a fundamental right, whether it is possessed by, and vested in, the individual or merely sought by him

In determining whether the right is fundamental the courts do not alone weigh the economic aspect of it, but the effect of it in

50. *Bixby v. Pierno*, 4 Cal. 3d 130, 144, 93 Cal. Rptr. 234, 244 (1971); *Frink v. Prod.*, 31 Cal. 3d 166, 177-78, 181 Cal. Rptr. 893, 898-99 (1982) (vestedness is only one factor); *Interstate Brands v. Unemployment Ins. Appeals Bd.*, 26 Cal. 3d 770, 779-80, 163 Cal. Rptr. 619, 624-25 (1980) (right may be deemed fundamental either because the character and quality of its economic aspect or the character and quality of its human aspect).

51. *County of Alameda v. Board of Retirement*, 46 Cal. 3d 902, 251 Cal. Rptr. 267 (1988) (decision granted disability benefits to applicant which may increase County's required contributions to retirement system); *Interstate Brands*, 26 Cal. 3d at 776, 163 Cal. Rptr. at 623 (decision awarding unemployment compensation benefits may increase employer's future rate of contribution to unemployment fund).

An administrative decision having a pecuniary impact does not always call for independent judgment review. Most such decisions get only substantial evidence review. See, e.g., *Bixby*, 4 Cal. 3d at 147-48, 93 Cal. Rptr. at 246-47 (corporate reorganization approved by Commissioner); *Turner v. Board of Trustees*, 16 Cal. 3d 818, 129 Cal. Rptr. 443 (1976) (dismissal of probationary teacher for cause); *Automotive Management Group, Inc. v. New Motor Vehicle Bd.*, 20 Cal. App. 4th 1002, 1008-11, 24 Cal. Rptr. 2d 904, 907-08 (1993) (revocation of auto dealer franchise); *Hope Rehabilitation Servs. v. Department of Rehabilitation*, 212 Cal. App. 3d 938, 261 Cal. Rptr. 123 (1989) (facility must repay \$150,000 in state funds).

I defy anyone to provide a principled explanation of why pecuniary impact on local government or big business deserves independent judgment review or to distinguish the pecuniary impact cases which do and do not call for independent judgment.

human terms and the importance of it to the individual in the life situation.⁵²

For example, independent judgment covers suspension or revocation of drivers' licenses.⁵³ It covers the loss of social welfare benefits such as pensions and welfare, since such benefits are both vested and fundamental in the life situation of the recipient⁵⁴ and it covers negative personnel decisions of local agencies because of the obvious impact of such a decision on an employee's life.⁵⁵

Bixby and subsequent cases enormously complicated the problem by holding that independent judgment applies to non-vested interests if they are "fundamental" enough, with fundamentalness being judged both by the economic impact of the decision and by the "character and quality of its human aspect."⁵⁶ Thus cases involving *denial of applications* for public

52. *Bixby*, 4 Cal. 3d at 144, 93 Cal. Rptr. at 244.

53. *Berlinghieri v. Director of Motor Vehicles*, 33 Cal. 3d 392, 188 Cal. Rptr. 891 (1983), cautioned that a vested, fundamental right for mandamus purposes is not the same thing as a right that would trigger strict scrutiny under due process or equal protection. Thus the classifications in the implied consent law do not trigger strict scrutiny, but suspension of a driver's license pursuant to that law triggers independent judgment.

Following *Berlinghieri*, the court assumed that independent judgment applied to a case disputing the DMV's cancellation of plaintiff's vanity license plate because it may carry "connotations offensive to good taste and decency." *Kahn v. Department of Motor Vehicles*, 16 Cal. App. 4th 159, 169, 20 Cal. Rptr. 2d 6, 12 (1993).

54. *Strumsky v. San Diego County Employees Retirement Ass'n*, 11 Cal. 3d 28, 112 Cal. Rptr. 805 (1974) (widow's claim to obtain service-connected as opposed to non-service connected death benefit); *Harlow v. Carleson*, 16 Cal. 3d 731, 129 Cal. Rptr. 298 (1976) (loss of welfare benefits).

55. *Perea v. Fales*, 39 Cal. App. 3d 939, 114 Cal. Rptr. 808 (1974) (five-day suspension of police officer). The employer, however, gets only substantial evidence review of a decision refusing to uphold an employee's discharge. *County of Santa Clara v. Willis*, 179 Cal. App. 3d 1240, 1250, 225 Cal. Rptr. 244, 249 (1986).

The scope of review of school board decisions involving teachers is particularly problematic. Both a school district and a teacher receive independent judgment review of an ALJ's decision reversing or upholding the discharge of a permanent teacher. CAL. EDUC. CODE § 44945 (West 1993); *Pasadena Unified Sch. Dist. v. Commission on Professional Competence*, 20 Cal. 3d 309, 142 Cal. Rptr. 439 (1977). However, an ALJ's decision upholding a school district's decision not to rehire a probationary teacher for cause is generally reviewed under substantial evidence. *Turner v. Board of Trustees*, 16 Cal. 3d 818, 129 Cal. Rptr. 443 (1976) (substantial evidence—4-3 decision); *Bekiaris v. Board of Educ.*, 6 Cal. 3d 575, 100 Cal. Rptr. 16 (1972) (independent judgment in constitutional case). Why is the probationary teacher's career of less concern than the many other agency decisions reviewed under independent judgment such as a denied application for welfare or an unemployment insurance decision against the employer?

56. *Interstate Brands v. Unemployment Ins. Appeals Bd.*, 26 Cal. 3d 770, 780, 163 Cal. Rptr. 619, 625 (1980); *Bixby v. Pierno*, 4 Cal. 3d 130, 144, 93 Cal. Rptr. 234, 244 (1971) (quoted in text *supra* note 52). In another patently useless attempt to articulate a legal standard, the Court remarked that independent judgment covers "residual rights possessed by all of the citizenry to be exercised when circumstances require." *Frink v. Prod.*, 31 Cal. 3d 166, 180, 181 Cal.

assistance were swept under the independent judgment test since the applicant's very survival might depend on whether the benefits are received.⁵⁷ Yet rejected applicants for professional and occupational licenses, whose economic future may well depend on the outcome of the dispute, are still denied independent judgment review.⁵⁸

Whether a particular status has "fundamentalness" is particularly elusive in cases of agency decisions implementing a business, land use, natural resource, or environmental regulatory program.⁵⁹ By definition, such regulation imposes limitations on people's ability to run their businesses or deal

Rptr. 893, 900-01 (1982).

57. *Frink*, 31 Cal. 3d at 180, 181 Cal. Rptr. at 900-01; see also *Cooper v. Kizer*, 230 Cal. App. 3d 1291, 282 Cal. Rptr. 492 (1991) (application for Medicaid); *Kerrigan v. Fair Employment Practice Comm'n*, 91 Cal. App. 3d 43, 154 Cal. Rptr. 29 (1979) (whether job application rejected because of age discrimination). But see *Turner v. Board of Trustees*, 16 Cal. 3d 818, 129 Cal. Rptr. 443 (1976) (denying independent judgment review to probationary teacher dismissed for cause because insufficiently vested).

58. See, e.g., *Unterthiner v. Desert Hosp. Dist.*, 33 Cal. 3d 285, 188 Cal. Rptr. 590 (1983) (rejection of doctor's application to be on staff of a public hospital). The idea seems to be that agency expertise is more significant in deciding questions of application for licenses than in deciding questions of revocation. However, it seems that expertise in denying applications for welfare is less important than in denying applications for licenses. The lack of logic in these distinctions has been often criticized: Agency expertise may or may not be involved in decisions to grant permission as well as in decisions to withdraw a prior permission.

Similarly, independent judgment does not apply to review of the Board of Prison Terms' decision to rescind parole since the decision concerning a future release date does not affect a vested right. *Powell v. Superior Court*, 45 Cal. 3d 894, 903, 248 Cal. Rptr. 431, 436 (1988) ("any evidence" standard applies rather than "substantial evidence").

59. Most decisions negatively affecting business are reviewed under substantial evidence. See, e.g., *Standard Oil Co. v. Feldstein*, 105 Cal. App. 3d 590, 603-06, 164 Cal. Rptr. 403, 410-12 (1980) (holding that an order shutting down a refinery unit constructed at a cost of \$200 million did not threaten Standard Oil with financial ruin; therefore, its right to continue operating was neither fundamental nor vested). Similarly, a decision finding an employer guilty of discrimination is reviewed under substantial evidence, while a decision finding that no discrimination occurred is reviewed under independent judgment. *Los Angeles County Dep't of Parks and Recreation v. Civil Serv. Comm'n*, 8 Cal. App. 4th 273, 279, 10 Cal. Rptr. 2d 150, 153 (1992).

Some negative decisions affecting business do receive independent judgment review, especially if they require the payment of money or touch on some constitutional right. See *supra* text accompanying note 51; see also *Halaco Eng'g Co. v. South Central Coast Regional Comm'n*, 42 Cal. 3d 52, 62-66, 227 Cal. Rptr. 667, 672-76 (1986) (whether applicant for development permit had vested right). A rent control board's decision lessening a landlord's control over his property was subject to independent judgment review. *301 Ocean Ave. Corp. v. Santa Monica Rent Control Bd.*, 228 Cal. App. 3d 1548, 279 Cal. Rptr. 636 (1991). But denial of a landlord's request for a rent increase is reviewed under substantial evidence, even though it would be unconstitutional to set the rent so as to deny a reasonable return. *San Marcos Mobilehome Park Owners' Ass'n v. City of San Marcos*, 192 Cal. App. 3d 1492, 238 Cal. Rptr. 290 (1987).

with their property, but the decisions on whether independent judgment applies are all over the map.⁶⁰

This Article makes no attempt to discuss comprehensively the endless stream of conflicting cases that grapple with the independent judgment/substantial evidence distinction. That would require a lengthy and tedious study, and it would be outdated the day after it was written. In sum, the distinction is utterly incoherent and the standard can be applied only by what Justice Newman called "the incessant litigants' parade" to the courts.⁶¹

C. Recommendations

Whether by judicial decision or legislation,⁶² California should dis-

60. *Goat Hill Tavern v. City of Costa Mesa*, 6 Cal. App. 4th 1519, 8 Cal. Rptr. 2d 385 (1992), reviewed a city's refusal to renew a saloon's conditional use permit. Independent judgment was required because the decision under review would extinguish an existing business entirely as distinguished from merely reducing its profits. *Id.* at 1526-30, 8 Cal. Rptr. 2d at 389-91. In contrast, *Smith v. County of Los Angeles*, 211 Cal. App. 3d 188, 196-200, 259 Cal. Rptr. 231, 233-38 (1989), denied independent judgment to a decision refusing a conditional use permit for an adult entertainment facility, thus putting it out of business. And refusal to grant a permit to allow a homeowner to build a wall protecting his house from destruction by the sea (without granting a right of public access to the beach) is also reviewed under substantial evidence. *Whalers' Village Club v. California Coastal Comm'n*, 173 Cal. App. 3d 240, 220 Cal. Rptr. 2 (1985), cert. denied, 476 U.S. 1111 (1986).

61. *Frink v. Prod.*, 31 Cal. 3d 166, 182, 181 Cal. Rptr. 893, 902 (1982) (Newman, J., dissenting).

62. Recent decisions by the legislature about scope of review reveal the normal tug of special interest lobbying. Yet there seems to be a trend that favors the substantial evidence test. For example, overruling a Supreme Court case, the legislature dispensed with independent judgment review of hospital decisions to exclude doctors from staff. CAL. CIV. PROC. CODE § 1094.5(d) (West 1980 & Supp. 1995) (overruling *Anton v. San Antonio Community Hosp.*, 19 Cal. 3d 802, 140 Cal. Rptr. 442 (1977)). The Agricultural Labor Relations Act and CAL-OSHA legislation mandate substantial evidence review in all cases. CAL. LAB. CODE § 1160.8 (West 1989) (upheld in *Tex-Cal*, discussed *supra* text accompanying notes 40-42); *id.* § 6629 (West 1989). Similarly, judicial review of adjudicatory decisions under the California Environmental Quality Act employs substantial evidence, not independent judgment. CAL. PUB. RES. CODE §§ 21168, 21168.5 (West 1986).

On the other hand, the legislature called for independent judgment review of decisions of the Water Resources Control Board. CAL. WATER CODE § 13330(b) (West 1992). Proposition 103 preserved independent judgment in insurance ratemaking cases. CAL. INS. CODE §§ 1858.6, 1861.09 (West 1993); see also *20th Century Ins. Co. v. Garamendi*, 8 Cal. 4th 216, 271-73, 32 Cal. Rptr. 2d 807, 841-42 (1994). Statutes require independent judgment in cases of judicial review of the dismissal of permanent teachers. CAL. EDUC. CODE § 44945 (permanent teachers), § 87682 (community colleges) (West 1993). The legislature left independent judgment intact when it transferred Medical and Podiatric Board review to the Court of Appeals. CAL. BUS. & PROF. CODE § 2337 (West Supp. 1995). Finally, it kept independent judgment in attorney discipline cases when it adopted the State Bar Court, although the Supreme Court's test in such cases is actually close to substantial evidence. *Borré v. State Bar*, 52 Cal. 3d 1047, 1051-52, 277 Cal.

pense with its idiosyncratic independent judgment test⁶³ and instead should adopt the substantial evidence on the whole record test.

1. Protection of Individual Rights Under the Substantial Evidence Test

A key policy question is whether the substantial evidence test adequately protects private rights. So far as one can tell from the absence of complaints in the literature, private rights are adequately safeguarded in cases arising from agencies in the other forty-nine states or from federal agencies. However, federal law contains an important gloss on substantial evidence, one that California should explicitly adopt.⁶⁴ A federal court gives great weight to an ALJ's credibility decision that is based on a witness' demeanor. Where the agency heads differ from the ALJ on a finding of witness credibility, this difference detracts from the substantiality of the evidence supporting the agency's decision.⁶⁵

In contrast, under existing California law, the reviewing court ignores the ALJ's proposed decision once it has been rejected by agency heads,⁶⁶ except in workers' compensation cases where the federal rule is followed.⁶⁷ California's rule detracts from the vitally important function of the ALJ who is a professional trier of fact. It also seriously diminishes the accept-

Rptr. 864, 866-67 (1991).

63. This recommendation does not apply to review of issues so infused with constitutional considerations that the court is unwilling to entrust fact finding responsibility to administrative agencies. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 498-511 (1984) (whether magazine acted with actual malice in public-figure defamation case); *Miller v. California*, 413 U.S. 15, 25 (1973) (whether publication is obscene); *Bektaris v. Board of Educ.*, 6 Cal. 3d 575, 590-93, 100 Cal. Rptr. 16, 24-27 (1972) (whether teacher dismissed for cause or for exercising constitutional rights).

64. See *Asimow*, *supra* note 1, at 1113-24.

65. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 492-97 (1951); see also 2 DAVIS & PIERCE, *supra* note 22, § 11.2 at 178-90.

66. See *Travelers Indem. Co. v. Gillespie*, 50 Cal. 3d 82, 102-03, 266 Cal. Rptr. 117, 130-31 (1990) (hearing officer's report has no legal significance so need not be disclosed); *Compton v. Board of Trustees*, 49 Cal. App. 3d 150, 157-58, 122 Cal. Rptr. 493, 498 (1975) (rejected proposed decision has no identifiable function in judicial review process); *National Auto. & Casualty Ins. Co. v. Industrial Accident Comm'n*, 34 Cal. 2d 20, 27-30, 206 P.2d 841, 841-46 (1949) (difference between agency heads and referee on credibility issue has no significance on judicial review).

67. *Lamb v. Workmen's Compensation Appeals Bd.*, 11 Cal. 3d 274, 281, 113 Cal. Rptr. 162, 166 (1974); *Garza v. Workmen's Compensation Appeals Bd.*, 3 Cal. 3d 312, 318, 90 Cal. Rptr. 355, 359 (1970). This rule has occasionally been applied to judicial review of other California non-APA agencies. *Apte v. Regents of Univ. of Cal.*, 198 Cal. App. 3d 1084, 1092, 244 Cal. Rptr. 312, 316 (1988) (Chancellor's decision overturning hearing committee); *Millen v. Swoap*, 58 Cal. App. 3d 943, 947, 130 Cal. Rptr. 387, 390-91 (1976) (Department of Social Services).

ability of the process to outsiders who are more likely to trust the decision of the judge who heard the witnesses testify than of the agency heads who decide credibility issues from a transcript. Thus, adoption of the federal rule would give the substantial evidence test much greater potentiality for protecting the rights of persons adversely affected by an agency decision.

It should be made emphatically clear that the test of substantial evidence on the whole record⁶⁸ is not a toothless standard which calls for a court merely to rubber stamp an agency's findings if there is "any evidence" to support them.⁶⁹ The reviewing court is empowered and obliged by the substantial evidence test to reverse an agency decision that seems unresponsive to the evidence or unfair. That is what Superior Court judges claim they actually do now when they apply the substantial evidence test in reviewing agency findings⁷⁰ and that is what they should do. If there is any doubt that substantial evidence is intended to provide for meaningful review in administrative cases,⁷¹ the judicial or legislative decision that dispenses with independent judgment should make this point unmistakably clear.⁷²

68. As noted earlier, the whole record test obliges reviewing courts to consider the evidence on both sides, not just the prevailing side. See *supra* note 31.

69. Discussing the substantial evidence test, a Court of Appeal said:

Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon [sic] other experts, or upon factors which are speculative, remote, or conjectural, then his conclusion has no evidentiary value. . . . In those circumstances, the expert's opinion cannot rise to the dignity of substantial evidence. . . . When a trial court has accepted an expert's ultimate conclusion without critical consideration of his reasoning, and it appears the conclusion was based upon improper or unwarranted matters, then the judgment must be reversed for lack of substantial evidence.

Pacific Gas & Elec. Co. v. Zuckerman, 189 Cal. App. 3d 1113, 1135-36, 234 Cal. Rptr. 630, 643 (1987) (citations omitted); see also James C. Martin, *New Bite for an Old Maxim: Appellate Courts Put Some Teeth into the Substantial Evidence Rule* 10 CAL. LAW., June, 1990, at 73 (substantial evidence test has bite in California).

In the area of administrative law, see, as examples of meaningful judicial review under the substantial evidence test, *Sierra Club v. California Coastal Comm'n*, 12 Cal. App. 4th 602, 15 Cal. Rptr. 2d 779 (1993) (lack of substantial evidence in environmental case); *Sierra Club v. Contra Costa County*, 10 Cal. App. 4th 1212, 1223, 13 Cal. Rptr. 2d 182, 189 (1992) (same); *Newman v. California State Personnel Bd.*, 10 Cal. App. 4th 41, 12 Cal. Rptr. 2d 601 (1992) (lack of substantial evidence to support personnel decision).

70. I interviewed numerous Superior Court judges who have experience in administrative mandamus practice. Virtually all of them agreed emphatically with this statement.

71. Witkin's discussion of substantial evidence in California procedure attempts to discourage attorneys from pursuing review because judicial reversal is unlikely. 9 B. E. WITKIN, CALIFORNIA PROCEDURE §§ 278-85 (1985). I think Witkin overstates the matter.

72. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489-90 (1951) (holding that the federal APA sent a message to reviewing courts to be less deferential in applying the substantial evidence test than some of them had been prior to its enactment).

Many California administrative law professionals oppose the abolition of independent judgment, because they agree with Justice Tobriner's opinion in *Bixby*: Independent judgment is needed to provide a check against tyrannical agencies that have been captured by powerful private elements or are crazed by law enforcement zeal.⁷³ In evaluating this objection, it is important to realize that courts would retain very substantial powers to reverse unjust agency decisions under a substantial evidence regime.

As already mentioned,⁷⁴ the substantial evidence test can be a remarkably powerful weapon in the hands of a reviewing judge who is offended by the agency outcome, particularly where the agency heads have disagreed with the credibility findings of an ALJ. An additional and extremely significant point is that under the substantial evidence test, an *appellate court* has much broader reviewing power than it has under independent judgment;⁷⁵ thus the greater power of the appellate court would, in part, compensate for the decreased reviewing power of the *trial court*.

In addition, as discussed in Part IV of this Article, reviewing courts are and will remain empowered to find an agency decision an abuse of discretion—a potent weapon against apparently overzealous regulators who might, for example, revoke a license for a trivial first offense. Under either judicial review test, California courts frequently set aside penalty decisions as an abuse of discretion while affirming an agency's findings of fact.⁷⁶ Similarly, as discussed in Part V, courts retain power to correct procedural errors; a judge concerned with unfair results can often find a procedural error (such as inadequate notice, findings, or explanation or unexplained

73. See *supra* text accompanying note 44.

74. See *supra* text accompanying notes 33, 68–72.

75. See *supra* text accompanying notes 37–39.

76. See, e.g., *West Valley-Mission Community College Dist. v. Concepcion*, 16 Cal. App. 4th 1766, 1778–79, 21 Cal. Rptr. 2d 5, 12–13 (1993) (increasing penalty to discharge from employment rather than one year suspension); *County of Santa Clara v. Willis*, 179 Cal. App. 3d 1240, 1250–52, 225 Cal. Rptr. 244, 249–51 (1986) (increasing penalty to discharge rather than reinstatement without pay); *Toyota of Visalia, Inc. v. Department of Motor Vehicles*, 155 Cal. App. 3d 315, 324–28, 202 Cal. Rptr. 190, 196–99 (1984) (penalty against car dealer excessive because inconsistent with similar cases); *Skelly v. State Personnel Bd.*, 15 Cal. 3d 194, 219, 124 Cal. Rptr. 14, 31–32 (1975) (dismissal excessive penalty for taking long lunch breaks); *Harris v. Alcoholic Beverage Control Appeals Bd.*, 62 Cal. 2d 589, 43 Cal. Rptr. 633 (1965) (random incidents not sufficient for revocation of liquor license); *Magit v. Board of Medical Examiners*, 57 Cal. 2d 74, 87, 17 Cal. Rptr. 488, 495 (1961) (revocation of license of doctor who used unlicensed personnel to anesthetize patients was excessive). The *Toyota* decision was disapproved by later cases on the basis that its formulation unduly restricted the power of an appellate court reviewing a trial court's determination of whether a penalty is excessive. As a result, both the trial court and the appellate court have the power to set aside an agency penalty as an abuse of discretion. See *Talmo v. Civil Serv. Comm'n*, 231 Cal. App. 3d 210, 227–28, 282 Cal. Rptr. 240, 249–51 (1991).

inconsistency with prior cases) with which to compel an agency to reexamine a case.

Most importantly, as discussed in Part II, California courts retain the power of independent judgment over questions of law. Captured or overzealous agencies are at least as likely to make errors of law (such as by misinterpreting provisions in applicable statutes) as to make skewed factual judgments. Moreover, as discussed in Part III, issues of application of law to fact should also be classified as questions of law, over which a court has the power of independent judgment. Application issues include the often critical questions about whether the facts fit a broadly stated statutory term, like "gross negligence" or "unprofessional conduct" or "employee." By classifying application issues as questions of law, a court is given great latitude in deciding how much deference, if any, to accord the agency decision in a particular case.⁷⁷

In short, because courts can extract issues in a given case and treat them as issues of discretion, procedure, or law, courts have considerable latitude in protecting regulatees against overzealous agencies. As a result, a substantial evidence regime satisfies the fundamental criterion that the judicial review system provide protection to the victims of administrative overreaching and furnish an adequate judicial check on administrative error.

2. Historic Arguments

Fifty years ago, independent judgment emerged from an era of intense judicial hostility to administrative agencies. Today, most people accept economic regulation and agency adjudication as constitutionally appropriate and practically indispensable. Independent judgment is a vestige of a bygone era that should be swept away with other discredited judicial stratagems that inhibited government from governing.

At the time the courts fashioned the independent judgment test, California lacked an APA and modern notions of procedural due process had not yet taken root.⁷⁸ In 1940, no law assured fair and impartial administrative procedure, so there was much greater need for a judicial check on agencies. Today, however, both statutory and constitutional law assure fair procedure.

77. See *infra* text accompanying notes 220-230.

78. The key decisions establishing independent judgment occurred between 1936 and 1943. The APA was enacted in 1945. The modern due process era dates from *Goldberg v. Kelly*, 397 U.S. 254 (1970).

Indeed, it is a striking irony that the attorneys who have protested most vehemently to the author and to the Law Revision Commission against abolition of the independent judgment test represent professional licensees, particularly physicians. Yet professional licensees are the beneficiaries of California's central panel system of independent ALJs that is the envy of most other states and of the federal bar.⁷⁹ Our independent ALJs provide a vitally important buffer against regulatory zeal or harassment. Independent judgment seems *least* needed in administrative schemes that employ independent ALJs.

3. Arguments for Rejecting the Independent Judgment Test

The independent judgment test scores poorly with respect to the fundamental criteria which should guide our policymaking: accuracy, efficiency,⁸⁰ and acceptability; it also runs counter to various political objectives that a review system should strive to achieve. Its only advantage is that it may make the process of administrative law enforcement and judicial review more acceptable to private regulatees, although that is debatable;⁸¹ in any event, the arguments against the test clearly outweigh this advantage.

a. Accuracy Concerns

(1) *Independent Judgment Generates Inaccurate Results*

A troubling aspect of independent judgment is that it substitutes the factual conclusions of a non-expert trial judge for the expert and professional conclusions of the ALJ and the agency heads. Especially in cases involving technical material or the clash of expert witnesses, the professionals are more likely to make the right call than a generalist trial judge who has no experience in assessing such matters and probably lacks the time and energy

79. See *supra* note 5 and accompanying text. The existing APA applies primarily to professional and occupational licensing agencies; independent ALJs function only in cases under the APA. CAL. GOV'T CODE § 11501 (West 1992 & Supp. 1995). The Office of Administrative Hearings ("OAH") employs about forty ALJs who are assigned as needed to the APA agencies that hold hearings.

80. In most situations, a reform that increases accuracy of outcomes is accompanied by additional costs. See Kaplow, *supra* note 2, at 308. Independent judgment provides the rare example of a procedure that diminishes accuracy and increases cost.

81. See *infra* text accompanying notes 124-128.

to master them.⁸² The professionals are the ALJs who try cases of this sort every day, actually hear the lay and expert witnesses testify, and can take the necessary time to understand the issues and to question the experts until they do understand. The professionals also include, of course, the agency heads (assisted by their advisory staff) who, by reason of their professional and regulatory experience, are often well qualified for the task.⁸³

Independent judgment presents an additional accuracy related problem: It insures a pattern of decisions that cannot be uniform. Administrative mandamus actions are generally filed in the county of the plaintiff's place of business.⁸⁴ Thus every superior court in the state hears Section 1094.5 cases.⁸⁵ This system insures disparity of results. Given the responsibility to find the facts, judges naturally project their own philosophic biases for and against the regulatory system into the process of factfinding. Disparity between judges is an inevitable result of our judicial system, but it is neither an inevitable nor a desirable result when applied to the judicial review of the decisions of a regulatory agency. And there may well be a systematic anti-law enforcement bias in this pattern of disparate decision-making. Especially in counties that do not have a heavy volume of writ

82. "A judge's cram course in medicine is a poor substitute for the professional judgment of the highly educated practitioners in the field." *Anton v. San Antonio Community Hosp.*, 19 Cal. 3d 802, 832, 140 Cal. Rptr. 442, 460 (1977) (Clark, J., dissenting).

83. Defenders of independent judgment claim that the expertise argument is oversold because trial judges decide technical cases all the time. Moreover, attorneys introduce expert testimony in administrative hearings so that a generalist judge can understand the technical or specialized evidence.

I am not persuaded. Judges are extremely busy and have limited time and energy to master difficult scientific or technical material they were never trained to deal with. A judge's assessment of technical matters remains at best an educated guess, at worst a shot in the dark. We should not assume that judges can become experts quickly in issues that professionals take a lifetime to master. Many Superior Court judges I interviewed felt at a disadvantage in dealing with difficult scientific or other technical issues in writ cases. The force of the argument in the text is lessened to the extent that agency heads are public members rather than professionals.

84. 2 GREGORY L. OGDEN, CALIFORNIA PUBLIC AGENCY PRACTICE § 53.03[3] (1994) (discussing CAL. CIV. PROC. CODE § 393(1)(b) (West 1973) which states that county in which cause of action arose is proper county for trial of action against public officials); see also *Duval v. Contractors State License Bd.*, 125 Cal. App. 2d 532, 271 P.2d 194 (1954) (county in which contractor's business was situated); *Sutter Union High Sch. Dist. v. Superior Court*, 140 Cal. App. 3d 795, 190 Cal. Rptr. 182 (1983) (teacher dismissal case—county where relevant events occurred).

85. Medical Board cases are an exception; they must be filed in Sacramento, San Francisco, Los Angeles, or San Diego. CAL. BUS. & PROF. CODE § 2019 (West 1990). Such cases are shortly to be transferred to the Courts of Appeal. See *supra* note 62.

business or specialized writ courts, hometown judges may lean over backwards for a hometown professional represented by a hometown lawyer.⁸⁶

(2) *Independent Judgment Is Ineffective to Counteract Institutional Bias*

Defenders of independent judgment strongly dispute this account. Following Justice Tobriner in *Bixby*,⁸⁷ they claim that regulators are often fired with regulatory zeal, intimidated by adverse criticism into prosecuting trivial cases, running amok through the welfare rolls, captured by their staff, vindictively trying to silence critics or mavericks, or engaged in fighting some kind of turf war. Presumably, the argument goes, superior court judges are more dispassionate and can use their independent judgment power to reach more accurate results than the agencies.

No doubt, agency personnel sometimes go out of control, but in my view, not often. Most agency staff and agency heads conscientiously try to enforce the law fairly. Given extremely limited investigational and prosecutory resources, they tend to focus only on the most egregious cases. Using the independent judgment standard to rein in agencies that are infected by prosecutorial bias or some other dysfunctional attitude makes sense only if one assumes that such phenomena occur frequently. We forget that more often than not it is the aggressive regulatory agency that is the "maverick;"⁸⁸ passivity in professional licensing agencies has been more the rule than the exception.⁸⁹ Rules of judicial review that discour-

86. Members of the Attorney General's staff whom I interviewed assert that this is the case. Moreover, we should not forget that judges in California are subject to election challenges. A local judge upholding discipline against a popular local professional could earn a new set of enemies who might easily finance or support an election challenge.

87. See *supra* text accompanying notes 43-44.

88. California's professional and occupational licensing agencies take relatively few disciplinary actions toward licensees. Excluding contractors, automotive repair, and collection and investigative services, 33 agencies under the jurisdiction of the Department of Consumer Affairs combined revoked 275 licenses during the 1992-93 fiscal year (46 of them physicians) and 352 during the 1991-92 fiscal year (26 of them physicians). Somewhat larger numbers of licensees suffered lesser penalties such as suspension and probation. 1992-93 CAL. DEP'T OF CONSUMER AFF. ANN. REP. 80; 1991-92 CAL. DEP'T OF CONSUMER AFF. ANN. REP. 81. By comparison, attorney discipline is adjudicated by an autonomous State Bar Court which disposed of 683 cases in 1993. In the first eleven months of 1993, 53 lawyers were disbarred, 218 were suspended, and 124 received probation. Letters to Robert Fellmeth, Director of Center for Public Interest Law, University of San Diego School of Law, from State Bar of California and from Office of Chief Trial Counsel of the State Bar (both dated Jan. 21, 1994) (on file with author).

89. As retired Judge B. Abbott Goldberg wrote:

The court still seems to fail to appreciate that an administrative agency may be the servant of the public rather than the enemy of a licensee. A "maverick" hospital that disciplines a deficient doctor may do so to assure the quality of care to patients. This

age aggressive law enforcement, in order to deal with the relatively rare case of regulatory fanaticism, are a case of misplaced priorities.

In any event, independent judgment of fact finding by trial courts addresses only a tiny part of the institutional bias problem.⁹⁰ There are many other ways that an agency might pick on disfavored groups or mavericks or conduct turf wars besides rendering biased fact findings. It might reject an application for a license, a decision reviewable only under substantial evidence. It might adopt a regulation disfavoring a group of competitors⁹¹ or use legislative muscle to get a statute passed or rejected. It could construe or apply the law in the course of adjudicating a case in a way that insures a harsh regulatory outcome no matter how the basic facts are found. Or an agency might assess a disproportionately heavy penalty for a trivial rule violation, a decision reviewable only under abuse of discretion, not independent judgment.⁹² This independent judgment cannot be counted on to have any significant impact on the problem of institutional bias.

b. Efficiency Arguments

A judicial review system must be realistic about the practical capabilities and limited resources of the judiciary. In addition, it should draw clear lines and avoid tricky distinctions to avoid spawning litigation on peripheral issues. In short, judicial review should be efficient, meaning that it should function with the least delay, the least confusion, and at the lowest possible cost to litigants, the government, and the courts. Independent judgment is very inefficient.

First, the issue of scope of review is itself a massive consumer of judicial resources.⁹³ Year after year, dozens of appellate court decisions (and probably hundreds of trial court decisions) grapple with the peripheral issue

"maverick and unconventional" hospital may be as much deserving of protection as an individual practitioner.

Goldberg, *supra* note 18, at 30.

90. A more effective prescription for dealing with the problem of prosecutory bias of decisionmakers would be enactment of a provision for separation of functions that would cover all California adjudicating agencies. Separation of functions would prevent agency staff members who take an adversarial position in a given case from advising the decisionmakers in the same case. The Law Revision Commission's proposed APA contains such a provision. See *infra* note 346.

91. See *Moore v. California State Bd. of Accountancy*, 2 Cal. 4th 999, 9 Cal. Rptr. 2d 358 (1992) (prohibiting noncertified accountants from calling themselves accountants); *California Ass'n of Psychology Providers v. Rank*, 51 Cal. 3d 1, 270 Cal. Rptr. 796 (1990) (regulation limiting practice of psychologists inconsistent with statute).

92. See *infra* Part IV.

93. See Walker, *supra* note 20.

of whether or not independent judgment applies, instead of proceeding quickly to decide the merits.⁹⁴ And when the decision about scope of review turns, as it does, on the degree of "vestedness" and the degree of "fundamentalness," and such vapid standards as the effect of the agency decision "in human terms and the importance of it to the individual in the life situation,"⁹⁵ judges are bound to be puzzled and, indeed, are encouraged to play favorites.

Second, the independent judgment test makes exceptional demands on trial court judges, far greater than those imposed by the substantial evidence test.⁹⁶ Independent judgment requires an exacting scrutiny of every word in the record, and sometimes the transcripts are very lengthy.⁹⁷ Assume a case like the Ace accounting hypothetical⁹⁸ in which a professional's license has been revoked for gross negligence. There is solid expert testimony on both sides. The probability that the professional in fact was grossly negligent lies within a range of 40%–60% either way. In such a case, there is obviously substantial evidence to support the agency's decision revoking the license. It requires only a relatively cursory examination of the evidence in the record. If, however, the judge must decide which side preponderates—even if it is 49%–51%—the judicial burden is far greater.

Third, independent judgment is inefficient because it encourages more people to seek judicial review than would do so under substantial evidence. If the agency has presented a strong case and nothing suggests any irregularity in the proceedings, judicial review under a substantial evidence standard will probably be unavailing. People will not wish to pay lawyers to seek

94. Superior Court judges whom I interviewed agreed that a considerable amount of their time is consumed in determining which standard of review should be applied to a given case.

95. *Bixby v. Pierno*, 4 Cal. 3d 130, 144, 93 Cal. Rptr. 234, 244 (1971).

96. Most of the Superior Court judges I interviewed confirmed this statement. One told me that he believes that he cannot entrust the reading of the record to a law clerk or legal assistant in an independent judgment case. He must read every word himself, just as he would hear every word in a case in which he were the trial judge.

Under a recent amendment, cases involving medical and podiatric discipline must be accorded independent judgment by Court of Appeal judges rather than Superior Court judges. CAL. BUS. & PROF. CODE § 2337 (effective Jan. 1, 1996). Anyone familiar with the existing traffic jam in the Court of Appeal must be appalled at the demands this provision will make on appellate judges.

97. The Judicial Council report that proposed adoption of Section 1094.5 favorably quoted the reports of the United States Attorney General's Committee and the Benjamin Commission in New York and a law review article, all to the effect that independent judgment imposed a undue burden on California's judiciary. JUDICIAL COUNCIL OF CALIFORNIA, TENTH BIENNIAL REPORT TO THE GOVERNOR AND THE LEGISLATURE 148–49 (1944).

98. See *supra* text accompanying notes 5–8.

review unless there is good reason to believe that the decision is infected by legal or procedural errors or is factually unreasonable. In contrast, under independent judgment, the private party always has a shot.⁹⁹ After all, a generalist judge will decide the facts *de novo* without according any deference to the findings of the ALJ or the agency heads. In that situation, it will often be worth spending the extra money to seek review since there is nothing to lose by trying (except counsel fees).

In short, the inefficiency of independent judgment is a serious criticism of existing law. In this era of vastly (and increasingly) overburdened trial courts, the abolition of independent judgment would entail significant savings for our judicial system, in itself a highly desirable result.

c. Acceptability to Regulated Persons and to the Public

The only convincing argument in favor of the independent judgment test is that it makes the process appear more acceptable to regulatees. They believe that fairness requires that an independent generalist judge have primary responsibility for making the fact findings rather than the agency that they perceive has prosecuted (and perhaps persecuted) them.¹⁰⁰ Of course, it is difficult to divorce this process contention from the fact that the independent judgment test indisputably increases the odds that the ultimate outcome of the case will be favorable to regulatees (since only they, not the agency staff or the Attorney General, can appeal from the agency heads' decision). I suspect that regulatees and their lawyers like independent judgment primarily because it can only help, not hurt them.

Of course, the holders of interests protected by independent judgment are already entitled to procedural due process. In the case of state professional licensing decisions, they get it and more. They receive an initial hearing from a group of highly skilled administrative law judges structurally and attitudinally independent of the regulatory agency. Those initial ALJ

99. A Deputy Attorney General who handles Medical Board cases estimated that 90% of the physicians sanctioned by the Board seek judicial review.

100. In many cases, the institutional bias of the agency heads actually operates in the opposite direction. In professional licensing cases, a majority of the agency heads are members of the regulated profession. They often have a "there but for the grace of God go I" mentality that leads them to be forgiving of the errors of their colleagues. However, for purposes of argument, I assume the opposite here—that regulatees believe that the agency heads are infected with a prosecution institutional bias.

decisions are adopted by the agency heads in the vast majority of cases.¹⁰¹ Whether or not independent ALJs are employed, litigants normally receive virtually every possible protection to assure a fair result.¹⁰²

Research by social psychologists about procedural justice indicates that by far the most important factor in determining the acceptability of dispute resolution procedures is the ability of disputants to have some control over the process.¹⁰³ The key point is whether a party is allowed to tell his or her story and have it carefully considered by decisionmakers.¹⁰⁴ The adversarial procedures employed in formal administrative hearings meet this criterion very well. Because the rules of evidence are relaxed in comparison to judicial trials, a disputant is normally able to get the full story into evidence. Moreover, the requirement of findings and reasons for decision assures a disputant that his story received careful consideration.¹⁰⁵ Other quite important factors in measuring acceptability were the politeness of the third party decisionmaker and the likelihood that the ultimate decision would be consistent with the result in similar cases.¹⁰⁶ Far down the list was concern about possible bias of the decisionmaker and correctability

101. For example, during the 1992-93 fiscal year in cases brought by agencies under the jurisdiction of the Department of Consumer Affairs, excluding the Bureau of Automotive Repair, there were 970 proposed decisions by ALJs. All but 45 were adopted by the agency heads. Of non-adopted decisions, 7 were subsequently upheld; penalties were decreased in 6 and increased in 32. I have been informed by Consumer Affairs that the figures for the Bureau of Automotive Repair that indicate a large number of non-adopted (though subsequently upheld) decisions are in error. 1992-93 CAL. DEP'T OF CONSUMER AFF. ANN. REP. 81.

102. Hopefully, California will adopt a new APA which will further upgrade the procedural protections already available in state agency adjudication. Of course, no such generalizations can be made about local regulation where decisionmakers are constrained only by whatever procedural statutes or regulations happen to exist and by procedural due process. Thus there is a stronger argument for retaining independent judgment for appeals from local government than from state government. However, most of the local government decisions now reviewed under independent judgment are personnel decisions. Typically these decisions are surrounded by adequate procedural protections provided by collective bargaining agreement or by ordinance. As to the balance, I think the case for applying independent judgment to local decisions about benefit programs, or to environmental and land use decisions, is relatively weak. Thus I would urge that independent judgment be abolished for review of local as well as for state decisions.

103. E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988). This work summarizes the existing literature on the subject, which consists of dozens of studies. The most fundamental point, which all studies confirm, is that people prefer an adversary system in which the disputants control the way the story is told over an inquisitorial system in which the judge controls the flow of information and calls the witnesses. This result holds regardless of whether the disputant won or lost; even losers indicate far greater satisfaction with adversary rather than with inquisitorial systems.

104. *Id.* at 93-127.

105. *Id.* at 103-06.

106. *Id.* at 103-10.

of an erroneous decision.¹⁰⁷ This impressive body of research casts doubt on the notion that the existing system of administrative law would be unacceptable to litigants without independent judicial judgment.¹⁰⁸

Even if regulatees would find substantial evidence review unacceptable, this is not the whole story. Regulation is about more than providing the maximum possible set of protections to regulatees. The regulatory process must be fair and balanced, not only to regulated parties, but to the members of the public who the regulatory process is designed to protect. There is a vital public interest—a fundamental vested right, if you will—in allowing regulation to do its job.¹⁰⁹ Whether that job is removing incompetent or corrupt professional licensees, administering benefit programs, or engaging in land use planning, regulation of business, personnel decision-making, or environmental protection, the public has a real stake in a balanced, fair, and relatively efficient process. The public legitimately desires a regulatory and judicial system that will not remove *qualified* professionals from practice or *qualified* recipients from the welfare rolls, but also will not make it unreasonably difficult for the regulatory process to remove *unqualified* ones from practice or from the rolls.

Transferring responsibility for finding the facts from agencies to superior court judges biases the adjudicatory process in favor of those holding protected interests and against protection of the public. As discussed above, it tends to produce inaccurate and inconsistent results since superior court judges lack the time and expertise to familiarize themselves with the scientific, technical, or financial issues raised by the random assortment of independent judgment cases that happen to come to them.¹¹⁰ Moreover,

107. *Id.* at 107–10.

108.

Finally, if one is concerned with appearances and legitimacy, it is useful to consider whether additional procedures tend to enhance rather than detract from the public's view of the legal system In recent decades, one has heard more complaints about the litigation explosion, the excessive monetary cost and other burdens associated with particular types of lawsuits, and excess procedures delaying or denying justice than about a serious shortage of procedures or of an inadequacy of opportunities to be involved with lawyers or the legal system.

Kaplow, *supra* note 2, at 396.

109.

[T]he Oil Companies are asking us to determine they have a fundamental vested right to release gasoline vapors while dispensing fuel to their customers. How are we to answer the public, on the other hand, who assert a fundamental vested right to breathe clean air? If either exists, it must be the latter.

Mobil Oil Corp. v. Superior Court, 59 Cal. App. 3d 293, 305, 130 Cal. Rptr. 814, 824 (1976). The same could be said of the public's fundamental vested right to competent licensed professionals to serve them.

110. See *supra* text accompanying notes 82–83.

this inaccuracy systematically favors private litigants and disfavors the regulators (and thus the public they are seeking to protect) because the only decisions that come to the court are ones in favor of the agency and against the private litigant. The private interest gets a second bite at the apple; the public interest does not. And there is concern that some judges may lean in favor of their hometown professionals and against the bureaucrats.¹¹¹ It appears that the independent judgment test allows professionals to win a large number of cases before the superior court that they would lose if the substantial evidence test were used.¹¹² All this is cause for serious concern.

4. Political Theory and Separation of Powers

In evaluating the arguments for and against independent judgment, one fundamental point should not be overlooked: The legislature invested specialized administrative boards with primary responsibility for making certain kinds of decisions. If the agencies do a bad job, the governor can and should be blamed, because the governor's appointees have let down the people of the state either by overly passive regulation or by picking on people who should have been left alone. Only by allowing the agency heads to make their own decisions can they, and the governor who appointed them, be held accountable.

The independent judgment test transfers the responsibility for adjudicatory fact finding to unaccountable, generalist trial courts. This may lead agency heads and staff to wonder why they should try to solve a problem when their decisions count for nothing. Agencies entrusted with regulatory responsibilities should have the power to carry out their assigned duties; responsibility for regulation must be joined with authority to do the job. In short, the independent judgment test violates the fundamental criterion that a judicial review statute must protect agency autonomy.¹¹³

111. See *supra* text accompanying notes 84–86.

112. Unfortunately, it is not possible to confirm this statement by empirical evidence. My evidence is anecdotal, based on numerous interviews with lawyers on both the regulatory and private side and with judges. As an extreme example, one practitioner told me that in many years of practice representing professional licensees (mostly doctors), he had never lost an independent judgment case and never won a substantial evidence case. Even allowing for permissible exaggeration and even if most of his clients were the victims of unwarranted regulatory harassment, some of his clients who won in the superior court should probably not be practicing medicine.

113. See *supra* Part I.

5. Alternative Schemes

The courts or the legislature might consider some alternative approaches besides the existing regime of independent judgment or the recommended regime of substantial evidence on the whole record.

a. Clearly Erroneous

The clearly erroneous test is used by federal (but not California) appellate courts in reviewing the findings of lower court judges in cases without juries.¹¹⁴ It was also prescribed by the 1961 Model State Administrative Procedure Act,¹¹⁵ but rejected by the newer 1981 Model Act which adopts substantial evidence.¹¹⁶

A court using the clearly erroneous test should reverse if it "is left with the definite and firm conviction that a mistake has been committed."¹¹⁷ Thus the clearly erroneous test allows the reviewing court somewhat greater power to overturn agency fact findings than does the substantial evidence test¹¹⁸ but less power to do so than under independent judgment.¹¹⁹ Some authors have urged that the clearly erroneous test be used in administrative law in place of substantial evidence.¹²⁰

This would be a mistake. For one thing, it would be extremely confusing. In Washington, the clearly erroneous test was employed from 1972 until it was supplanted by adoption of the 1981 Model Act. Washington judges could not figure out how clearly erroneous differed from substantial

114. The Federal Rules provide that: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." FED. R. CIV. P. 52(a). Some California cases use the "clearly erroneous" test in defining the scope of judicial review of agency interpretations of law. See discussion in Part II.

115. Section 15(g)(5) provides for reversal if the decision is "clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record." MODEL STATE ADMINISTRATIVE PROCEDURE ACT OF 1961 § 15(g)(5), 15 U.L.A. 147, 301 (1990).

116. MODEL STATE ADMINISTRATIVE PROCEDURE ACT OF 1981 § 5-116(c)(7), 15 U.L.A. 7, 127 (1990).

117. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

118. See 2 DAVIS & PIERCE, *supra* note 22, § 11.2 at 174-75; 2 CHARLES KOCH, *ADMINISTRATIVE LAW AND PRACTICE* § 9.5 (1985); Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 80-89 (1944).

119. See *Anderson v. City of Bessemer*, 470 U.S. 564, 573-76 (1985) (reviewing court must defer to trial court findings, whether or not based on credibility, if findings are plausible in light of the whole record).

120. 2 FRANK E. COOPER, *STATE ADMINISTRATIVE LAW* 722-37 (1965).

evidence.¹²¹ Indeed, many writers cannot see any real difference between clearly erroneous and substantial evidence.¹²² To adopt a test hitherto unknown to California law, and expect generalist trial judges to understand just how the new test fits in between substantial evidence and independent judgment, guarantees confusion and conflicting decisions. Clarifying the substantial evidence test and giving it real bite would be preferable.¹²³

b. Apply Independent Judgment Only Where Agency Heads
Reject ALJ's Decision

Another fallback position would retain independent judgment for cases in which the agency heads reject an ALJ's proposed decision; substantial evidence would only apply to cases in which the agency heads accept the proposed decision. The argument is that prosecutorial overreaching is most likely to have occurred when the agency heads disagree with the ALJ's findings.¹²⁴ This approach alleviates many concerns about independent judgment because it would apply to relatively few cases; in the great majority of cases, agency heads accept ALJ proposed decisions.¹²⁵

Nevertheless, the compromise should be rejected. The disagreement between the agency heads and the ALJ may concern questions of law,

121. See William R. Andersen, *Judicial Review of Agency Fact-Finding in Washington: A Brief Comment*, 13 WILLAMETTE L. REV. 397 (1977).

122. See William R. Andersen, *Judicial Review of State Administrative Action—Designing the Statutory Framework*, 44 ADMIN. L. REV. 523, 552 (1992); Frank E. Cooper, *Administrative Law: The "Substantial Evidence" Rule*, 44 A.B.A. J. 945, 947 (1958); Arthur T. Vanderbilt, *Introduction*, 30 N.Y.U. L. REV. 1267, 1268 (1955). Vanderbilt wrote: "[The tests] are, in practice, so nearly alike that only the scholastic mind of the hypercritical law-review writer presumes to see any real difference between them." *Id.* at 1268. Some writers believe that clearly erroneous gives judges less power than substantial evidence. See McGrath et al., *supra* note 11, at 726. This was also the view of some Washington court decisions discussed in Andersen, *supra* note 121.

123. See *supra* text accompanying notes 68–72. Note that if the clearly erroneous test were established across the board, it would diminish the intensity of review in cases now decided under independent judgment but it would increase the intensity of review in cases now decided under substantial evidence, such as cases decided by constitutional agencies and cases in which there is no deprivation of a fundamental vested right.

124. An analogy can be drawn to the standard for granting a judicial stay of agency action. In licensing cases, there is a lower burden for obtaining a stay if the agency heads rejected the ALJ proposed decision than if they accepted that decision. See CAL. CIV. PROC. CODE §§ 1094.5(g), (h)(1), (2) (West 1980). In the former situation, a stay may be imposed unless the court is satisfied that it is against the public interest. In the latter situation, however, a stay shall not be imposed unless the court is satisfied that the public interest will not suffer and also that the agency is unlikely ultimately to prevail on the merits. Clearly, the legislature was concerned about possible injustice in cases of rejected proposed decisions and thus made it easier to obtain a judicial stay in such cases.

125. See *supra* note 101.

policy, or discretion, not findings of basic fact. However, these are matters of great importance to a regulatory scheme, and agency heads have the responsibility to make the final call. No suspicion attaches to agency head disagreements with ALJs about how to interpret a statute or regulation or what sort of policy approaches should be taken. Nor should independent judgment apply simply because the agency heads have increased a penalty. The penalty-increasing decision probably occurred because the ALJ's decision was out of line with penalties in similar cases, not because of any particular animus against the respondent.

On the other hand, if independent judgment is triggered only because of disagreements over credibility, the test will generate confusion, because it is often difficult to decide whether a reversal was based on differences over credibility. Many conclusions rest partly on judgments based on demeanor and partly on other factors such as assessing the impartiality of an expert witness or various sorts of technical analysis. We should seek to avoid on-off switches that are likely to generate peripheral litigation about what scope of review to employ.¹²⁶

II. JUDICIAL REVIEW OF AGENCY INTERPRETATIONS OF LAW

A. Introduction

An agency frequently has occasion to interpret the meaning of statutes or other legal texts such as its own regulations, judicial decisions, or the common law. It might engage in legal interpretation when carrying out any of its functions: adjudicating cases, engaging in rulemaking, advising regulatees or its own staff, or exercising discretion.

For example, suppose a statute provides that an applicant is disqualified from receiving unemployment benefits if she fails without good cause to accept suitable employment when offered to her. An agency regulation provides that such disqualification continues for a four week period, following which the applicant again becomes eligible for benefits. Employers contend that the regulation is invalid since the statute requires that the

126. The Florida statute makes it more difficult for agency heads to reverse an ALJ finding based on credibility than to reverse other sorts of findings. The case law indicates that this distinction has been difficult to apply and it has produced much controversy and litigation. See Asimow, *supra* note 1, at 1122-24.

disqualification extend to the entire period of employment. This is an issue of statutory interpretation.¹²⁷

Judicial review of agency legal interpretations is vitally important. Such decisions create precedents that define the boundaries of an agency's discretionary power and thus can determine the future of a regulatory regime.¹²⁸

B. Present California Law

The mainstream California rule is that a court exercises independent judgment when it reviews an agency's legal interpretation. It need not accept an agency's interpretation with which it disagrees, even if the legal text being interpreted is ambiguous and the agency's interpretation is reasonable. The same rule holds regardless of whether the interpretation is contained in a regulation, an adjudication, or in some other form of agency action.¹²⁹ This principle has been confirmed legislatively by Government Code section 11342.2 which appears to provide that courts should substitute judgment on legal issues when reviewing agency regulations.¹³⁰

Thus, in a recent case involving the legality of an administrative regulation, the California Supreme Court said:

When a court inquires into the validity of an administrative regulation to determine whether its adoption was an abuse of discretion, the scope of review is limited. . . . When, however, a regulation is challenged as inconsistent with the terms or intent of the authoriz-

127. This example is drawn from *Whitcomb Hotel, Inc. v. California Employment Comm'n*, 24 Cal. 2d 753, 151 P.2d 233 (1944), an opinion by Justice Traynor which invalidated the regulation.

128. Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1, 114-17 (1994).

129. See, e.g., *20th Century Ins. Co. v. Garamendi*, 8 Cal. 4th 216, 271, 32 Cal. Rptr. 2d 807, 841 (1994) (whether agency authorized to issue regulations and whether they are consistent with statute); *Pacific Southwest Realty Co. v. County of L.A.*, 1 Cal. 4th 155, 171, 2 Cal. Rptr. 2d 536, 546 (1991) (invalidating Board of Equalization tax regulation); *California Ass'n of Psychology Providers v. Rank*, 51 Cal. 3d 1, 11, 270 Cal. Rptr. 796, 800-801 (1990) (overturning statutory interpretation in a legislative regulation); *Dyna-Med, Inc. v. Fair Employment & Housing Comm'n*, 43 Cal. 3d 1379, 1388-89, 241 Cal. Rptr. 67, 71-72 (1987) (overturning interpretation contained in adjudicatory decision), *cert. denied*, 470 U.S. 1049 (1985); *Vaessen v. Woods*, 35 Cal. 3d 749, 756-57, 200 Cal. Rptr. 893, 897-99 (1984) (overturning interpretation of ambiguous statute in legislative regulation); *Carmona v. Division of Indus. Safety*, 13 Cal. 3d 303, 309-10, 118 Cal. Rptr. 473, 477-78 (1975) (overturning agency's interpretation of its own regulation).

130. Section 11342.2 provides that "no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." CAL. GOV'T CODE § 11342.2 (West 1992).

ing statute, the standard of review is different, because the courts are the ultimate arbiters of the construction of a statute. . . . "Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations."¹³¹

However, the rule that a court is empowered to exercise independent judgment on a question of legal interpretation is subject to several caveats.

1. Weak Deference

Depending on the particular context, courts are required to accord deference or "great weight" to an agency's interpretation.¹³² This approach can be called "weak deference," as opposed to the "strong deference" principle articulated in the famous *Chevron* decision.¹³³ Under a weak deference approach,¹³⁴ in appropriate circumstances an agency's

131. *California Ass'n of Psychology Providers*, 51 Cal. 3d at 11, 270 Cal. Rptr. at 801 (quoting *Morris v. Williams*, 67 Cal. 2d 733, 63 Cal. Rptr. 689 (1967)).

132. See, e.g., *Dix v. Superior Court*, 53 Cal. 3d 442, 460, 279 Cal. Rptr. 834, 843 (1991) ("Unless unreasonable or clearly contrary to the statutory language or purpose, the consistent construction of a statute by an agency charged with responsibility for its implementation is entitled to great deference."); *California Ass'n of Psychology Providers*, 51 Cal. 3d at 11, 270 Cal. Rptr. at 800-01 (recognizing "great weight" rule but invalidating interpretation in a legislative regulation); *Nipper v. California Auto. Assigned Risk Plan*, 19 Cal. 3d 35, 45, 136 Cal. Rptr. 854, 858-59 (1977) (referring to an administrative regulation: "We have generally accorded respect to administrative interpretations of a law and, unless clearly erroneous, have deemed them significant factors in ascertaining statutory meaning and purpose."); *Morris v. Williams*, 67 Cal. 2d 733, 748, 63 Cal. Rptr. 689, 699 (1967) (agency statutory construction entitled to great weight but final responsibility for interpretation rests with the courts); *Whitcomb Hotel, Inc. v. California Employment Comm'n*, 24 Cal. 2d 753, 757, 151 P.2d 233, 235 (1944) (great weight to agency's long-standing and substantially contemporaneous expression of meaning of statute); *Hudgins v. Neiman Marcus Group, Inc.*, 34 Cal. App. 4th 1109, ___, 1995 Cal. App. LEXIS 424, at *33-34 (1995) (refusing to give weak deference to agency opinion letter).

133. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984). *Chevron* requires courts to accept reasonable agency interpretations of ambiguous statutes. In *Western States Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559, 38 Cal. Rptr. 2d 139 (1995), the court cited *Chevron's* language about deference with approval, but the case involved judicial review of questions of discretion rather than questions of law.

134. California's weak deference approach is similar to that employed in numerous federal court decisions prior to *Chevron*. See 1 DAVIS & PIERCE, *supra* note 22, at 233-48; Ronald M. Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239, 267-70 (1986); David R. Woodward & Ronald M. Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 ADMIN. L. REV. 329 (1979). In *Skidmore v. Swift*, 323 U.S. 134 (1944), the Supreme Court stated the traditional approach as follows:

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will

view is given more weight by the court than the interpretation suggested by other litigants. When this sort of deference is given, and the interpretive question is close, the scales are likely to tip in the agency's direction. This weak deference approach is used in many states.¹³⁵

The key point of the weak deference principle is that it is *contextual*. It applies only where the court finds that deference is appropriate. The weak deference factors are like numerous principles and canons of statutory interpretation available to a court engaged in the process of ascribing meaning to text. Weak deference methodology requires the court to take account of various factors, but it also empowers a court to set aside an agency interpretation that is not faithful to the policy embodied in the statute being interpreted regardless of those factors. In contrast, under the *Chevron* strong deference approach, a court must *always* uphold an agency's reasonable interpretation of an ambiguous statute, even if the court believes it is extremely unwise.

Under the weak deference approach, the degree to which the court should defer to the agency's interpretation depends on numerous factors. These factors boil down to two sorts of indicia: (a) factors indicating that the agency has a comparative interpretive advantage over courts, and (b) factors indicating that the interpretation in question is probably correct.

a. Agency's Comparative Interpretive Advantage

In many situations, the legal text to be interpreted is technical, obscure, complex, or open-ended, or it may be entwined with issues of fact, policy and discretion. Frequently, agencies have developed the sort of expertise and technical knowledge that gives them a comparative advantage in interpreting such texts over a generalist court that lacks such qualifications.¹³⁶

depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. at 140.

135. See McGrath et al., *supra* note 11, at 768-70, which aptly describes it as the sliding scale approach. See, e.g., *Robert Hansen Trucking Inc. v. Labor & Indus. Rev. Comm'n*, 377 N.W.2d 151, 154-55 (Wis. Sup. Ct. 1985) (courts should refrain from substituting judgment depending on agency's experience, technical competence, and specialized knowledge).

136. See, e.g., *C.E. Buggy, Inc. v. Occupational Safety & Health Appeals Bd.*, 213 Cal. App. 3d 1150, 1156, 261 Cal. Rptr. 915, 918 (1989) (deference to agency's expertise); *Highland Ranch v. Agricultural Labor Relations Bd.*, 29 Cal. 3d 848, 859, 176 Cal. Rptr. 753, 759-60 (1981) (deference paid to ALRB's interpretation within scope of its expertise); *Pacific Legal Found. v. Unemployment Ins. Appeals Bd.*, 29 Cal. 3d 101, 111-13, 172 Cal. Rptr. 194, 198-200 (1981)

Similarly, agencies are often immersed in administering a particular statute. Such specialization gives those agencies an intimate knowledge of the problems dealt with in the statute and the various administrative consequences arising from particular interpretations. In contrast, a generalist court that visits a particular regulatory statute only infrequently lacks the advantage arising out of specialization. In short, if by reason of expertise, specialization or both, an agency demonstrably has qualifications to interpret a particular text that are superior to the court's, deference is appropriate.

The nature of the legal text being interpreted also makes a difference. A court is more likely to defer to an agency's interpretation of its own regulation than to its interpretation of a statute, since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation as opposed to another.¹³⁷ A court is also more likely to defer to an agency's interpretation of a statute that the agency enforces than to its interpretation of some other statute, the common law, the constitution, or prior judicial precedents. A court may have a comparative advantage with respect to the latter sorts of interpretations.

b. Agency Interpretation in Question Is Probably Correct

The degree to which the agency's interpretation appears to have been carefully considered by responsible agency officials is an important factor. For example, an interpretation of a statute contained in a regulation adopted after public notice and comment seems deserving of deference (as opposed, for example, to an interpretation contained in an advice letter sent out by a single staff member). Similarly, an interpretation contained in a written opinion rendered in the course of formal agency adjudication seems likely to have been carefully considered, whereas an unsupported legal conclusion would be entitled to little deference regardless of where it appears.¹³⁸

(precedent decision by expert agency entitled to great weight); *Young v. California State Bd. of Control*, 93 Cal. App. 3d 637, 640, 156 Cal. Rptr. 91, 93 (1979) (definition "require[s] the expertise and full technical knowledge available from the administrative agency. It would be presumptuous for a court to claim such skill").

137. *Westfall v. Swoap*, 58 Cal. App. 3d 109, 114, 129 Cal. Rptr. 750, 752 (1976) ("[W]hen the construction of an administrative regulation is in issue [it] is accorded even greater deference.").

138. See *Hudgins v. Neiman Marcus Group, Inc.*, 34 Cal. App. 4th 1109, ___, 1995 Cal. App. LEXIS 424, at *33-34 (1995) (no deference given Labor Commissioner's opinion letter).

Deference is called for if the agency has consistently maintained the interpretation in question, especially if the interpretation is longstanding.¹³⁹ A vacillating position, however, is entitled to no deference.¹⁴⁰ A longstanding and consistent interpretation is likely to induce reliance on the part of the public or other agencies, which justifies deferring to it.¹⁴¹

An interpretation is more worthy of deference if it first occurred at a time that was contemporaneous with enactment of the statute being interpreted.¹⁴² The theory is that agency personnel were probably instrumental in working with legislative committees responsible for passing the statute and so were familiar with legislative intent and the compromises embodied in the law.¹⁴³ And deference may also be appropriate if the legislature reenacted the statute in question with knowledge of the agency's prior interpretation.¹⁴⁴ Of course, an agency can abandon an old interpretation and substitute a new one, provided that the agency explains and

139. See, e.g., *Dix v. Superior Court*, 53 Cal. 3d 442, 460, 279 Cal. Rptr. 834, 843 (1991) (consistent construction entitled to great deference); *Whitcomb Hotel, Inc. v. California Employment Comm'n*, 24 Cal. 2d 753, 757-58, 151 P.2d 233, 236 (1944) (less deference to interpretation in regulation that was neither consistent nor longstanding); *Scates v. Rydingsword*, 229 Cal. App. 3d 1085, 1097, 280 Cal. Rptr. 544, 550-51 (1991) (great weight to county's uniform construction in manual); *Guinnane v. San Francisco Planning Comm'n*, 209 Cal. App. 3d 732, 738, 257 Cal. Rptr. 742, 746 (1989), cert. denied, 493 U.S. 936 (1989) (great weight to city's consistent interpretation of ordinance).

140. *Brewer v. Patel*, 20 Cal. App. 4th 1017, 1021-22, 25 Cal. Rptr. 2d 65, 68-69 (1993) (interpretation of regulation inconsistent with agency manual receives no deference).

141. *Whitcomb Hotel*, 24 Cal. 2d at 757, 151 P.2d at 235 (dictum). But see *Hudgins v. Neiman Marcus Group, Inc.*, 34 Cal. App. 4th 1109, ___, 1995 Cal. App. LEXIS 424, at *33-34 (1995) (change of direction in agency's opinion letter given no deference and could have induced no reliance).

142. See *Woosley v. State*, 3 Cal. 4th 758, 776, 13 Cal. Rptr. 2d 30, 38-39 (1992), cert. denied, 113 S. Ct. 2416 (1993); *California Ass'n of Psychology Providers v. Rank*, 51 Cal. 3d 1, 17, 270 Cal. Rptr. 796, 805 (1990) (great weight given opinions of Attorney General and Legislative Counsel that were contemporaneous with enactment of statute); *Dyna-Med Inc. v. Fair Employment & Hous. Comm'n*, 43 Cal. 3d 1379, 1388-89, 241 Cal. Rptr. 67, 70-72 (1987) (interpretation not contemporaneous); *IBM v. State Bd. of Equalization*, 26 Cal. 3d 923, 930, 163 Cal. Rptr. 782, 785 (1980) (contemporaneous construction entitled to great weight); *Nipper v. California Auto. Assigned Risk Plan*, 19 Cal. 3d 35, 44-45, 136 Cal. Rptr. 854, 858-59 (1977); *Whitcomb Hotel*, 24 Cal. 2d at 757, 151 P.2d at 235 (dictum).

143. See *Whitcomb Hotel*, 24 Cal. 2d at 757, 151 P.2d at 235; Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 368 (1986); Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 346-47 (1990) (agencies far better qualified to interpret legislative history than courts).

144. See *Moore v. California State Bd. of Accountancy*, 2 Cal. 4th 999, 1017-18, 9 Cal. Rptr. 2d 358, 368-69 (1992) (legislature presumed to be aware of longstanding administrative construction of statute); *Nelson v. Dean*, 27 Cal. 2d 873, 882, 168 P.2d 16, 21-22 (1946) (statute contains same language as agency's definition).

rationality justifies the change. However, the new interpretation would lack the deference called for by a consistently maintained interpretation.

2. Delegated Power to Interpret

Where the legislature has demonstrably delegated authority to an agency to interpret the law, the court must accept a reasonable agency interpretation under the abuse of discretion standard. Such delegation typically occurs where a statute empowers an agency to adopt a rule that defines language in the statute.¹⁴⁵ This is *not* the same as saying that the legislature delegated to an agency the power to interpret all the words in a statute just because it delegated legislative rulemaking authority to the agency¹⁴⁶ and *not* the same as saying that the legislature delegated interpretive power when it wrote an ambiguous statute. Instead, this principle applies only when a statute *demonstrably* delegates to the agency the power to interpret *particular* statutory language.

When a court reviews a regulation, it normally exercises independent judgment subject to weak deference with respect to interpretive issues (such as whether the regulation conflicts with the governing statute) but applies the abuse of discretion test to the issue of whether the regulation is reasonably necessary to effectuate the purpose of the statute.¹⁴⁷ However, if the court ascertains that the legislature meant to delegate the interpretive power as well as the policy-making power, it should apply the abuse of discretion test, rather than the weak deference test, to the agency's interpretation.

Courts may also find that the legislature intended to delegate interpretive power when it deliberately wrote unusually vague and open-ended statutory language that an agency must apply or when an issue of interpretation is heavily freighted with policy choices which the agency is empowered

145. See *Moore*, 2 Cal. 4th at 1013-14, 9 Cal. Rptr. 2d at 365-67 (legislature left to Board interpretation of phrase "likely to be confused" with C.P.A.).

146. See Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 30-37 (1985) (necessity for reviewing court to distinguish questions of law from questions of discretion in reviewing rules). As used in this Article, the term "legislative" rule or regulation means one adopted by an agency pursuant to delegated lawmaking power; an "interpretive" rule or regulation is not adopted pursuant to delegated lawmaking power. See generally Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 383-88.

147. See *supra* text accompanying note 131. Review for abuse of discretion is discussed *infra* Part IV.

to make.¹⁴⁸ Moreover, a long line of cases involving Board of Equalization tax regulations appear to hold that the legislature delegated power to the Board to interpret the meaning of taxation statutes, although the delegation to interpret is not explicit and the language is not unusually vague.¹⁴⁹

3. Possibly Inconsistent Case Law

Not all of California's case law is consistent with the preceding summary of the independent judgment rule and its corollaries. One line of cases appears to call for reasonableness review of agency interpretations of law, rather than the weak deference approach.¹⁵⁰ Most of these cases involve questions of law arising in the course of judicial review of agency regulations or other "quasi-legislative" agency action. These decisions

148. "Where the intelligibility of the statutory language depends upon the employment of administrative expertise, which it is the purpose of a statutory scheme to invoke, the judicial role 'is limited to determining whether the [Department] has reasonably interpreted the power which the Legislature granted it.'" *Henning v. Division of Occupational Safety & Health*, 219 Cal. App. 3d 747, 758-59, 268 Cal. Rptr. 476, 482 (1990) (emphasis added) (quoting *California Beer & Wine Wholesalers Ass'n v. Department of Alcoholic Beverage Control*, 201 Cal. App. 3d 100, 107, 247 Cal. Rptr. 60, 65 (1988)).

149. See, e.g., *Culligan Water Conditioning, Inc. v. State Bd. of Equalization*, 17 Cal. 3d 86, 92-93, 130 Cal. Rptr. 321, 324-25 (1976). *Culligan* differentiated an interpretation contained in a formal Board regulation (which the Court could review only for reasonableness) from an interpretation occurring in the course of Board adjudication or other agency activity (entitled to great weight but court could substitute judgment even if the interpretation was reasonable). *Id.* at 92, 130 Cal. Rptr. at 324; see also *Wallace Berrie & Co. v. State Bd. of Equalization*, 40 Cal. 3d 60, 65, 219 Cal. Rptr. 142, 145-46 (1985) (distinguishing between the scope of review applicable to legislative and interpretive rules); *IBM v. State Bd. of Equalization*, 26 Cal. 3d 923, 931 n.7, 163 Cal. Rptr. 782, 786 n.7 (1980). But see *Pacific Southwest Realty Co. v. County of L.A.*, 1 Cal. 4th 155, 171, 2 Cal. Rptr. 2d 536, 546 (1991) (invalidating Board of Equalization tax regulation without giving any deference).

150. See, e.g., *Ralphs Grocery Co. v. Reimel*, 69 Cal. 2d 172, 174-76, 70 Cal. Rptr. 407, 409-11 (1968).

In reviewing the propriety of administrative regulations allegedly promulgated pursuant to a grant of power by the Legislature, this court undertakes a two-pronged inquiry. . . . We first determine whether the regulation lies within the scope of authority conferred, and, second, '[i]f we conclude that the Administrator was empowered to adopt the regulations we must also determine whether the regulations are reasonably necessary to effectuate the purpose of the statute.' . . . Furthermore, these issues do not present a matter for the independent judgment of an appellate tribunal; rather, both come to this court freighted with the strong presumption of regularity accorded administrative rules and regulations

. . . .
In determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate.

Id. at 174-76, 70 Cal. Rptr. at 410-11 (emphasis added). Similarly, see *Ford Dealers Ass'n v. DMV*, 32 Cal. 3d 347, 355-56, 185 Cal. Rptr. 453, 457-58 (1982).

equate the court's power to reverse an agency's legal interpretation with its power to reverse an agency's discretionary judgment.¹⁵¹

These cases may not, however, be inconsistent with the general rule that a court has power to substitute judgment on questions of law. First, these decisions may intend their "reasonableness" language as merely a restatement of the ordinary weak deference rule.¹⁵² Second, these decisions may be based on the theory that the legislature intended to delegate interpretive power to the agency along with the power to adopt legislative rules. If the court so concluded, it would follow that it must accept any reasonable interpretation.¹⁵³

It seems reasonably clear that the Supreme Court is committed to the proposition that the courts have power to exercise independent judgment on questions of law subject to the rule of weak deference, even if the agency's interpretation is embodied in a legislative regulation, unless the legislature demonstrably intended to delegate interpretive power to the agency. Thus, earlier cases requiring courts to accept any reasonable interpretation contained in an agency rule would probably not be followed today if the

151. See *infra* Part IV.

152. A number of decisions engage in a mystifying form of double talk. See, e.g., *Ontario Community Foundation, Inc. v. State Bd. of Equalization*, 35 Cal. 3d 812, 816-17, 201 Cal. Rptr. 165, 168-69 (1984).

In determining the proper interpretation of a statute and the validity of an administrative regulation, the administrative agency's construction is entitled to great weight, and if there appears to be a reasonable basis for it, a court will not substitute its judgment for that of the administrative body.

. . . Such a limited scope of review constitutes no judicial interference with the administrative discretion in that aspect of the rulemaking function which requires a high degree of technical skill and expertise. . . . Correspondingly, there is no agency discretion to promulgate a regulation which is inconsistent with the governing statute. . . . Acknowledging that the interpretation of a statute by one charged with its administration was entitled to great weight, we nonetheless affirmed: "Whatever the force of administrative construction . . . final responsibility for the interpretation of the law rests with the courts." . . . Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to, strike down such regulations.

Id., 201 Cal. Rptr. at 168-69 (first emphasis added) (citations omitted) (quoting *Morris v. Williams*, 67 Cal. 2d 733, 748, 63 Cal. Rptr. 689, 699 (1967)).

153. See *supra* text accompanying notes 145-149. As already noted, this seems to be the implicit holding of cases involving tax regulations of the State Board of Equalization. See *supra* note 149. The *Ralphs* case also is probably explainable on this ground; the court implicitly decided that the legislature had intended to delegate the construction of the particular statutory words in issue ("foster and encourage the orderly wholesale marketing and wholesale distribution of beer") to the agency. *Ralphs*, 69 Cal. 2d at 174-76, 70 Cal. Rptr. at 409-11; see also *supra* note 150. This sort of extremely vague language may well entail a legislative decision to delegate interpretive power to the agency.

issue were clearly presented.¹⁵⁴ Moreover, these cases seem in conflict with Government Code section 11342.2, which appears to provide that courts reviewing agency regulations should substitute judgment on legal issues but may exercise only reasonableness review on the discretionary elements of the regulation.¹⁵⁵

Another line of California cases declares that a court should affirm the interpretation of a statute by an agency charged with its enforcement if that interpretation is not "clearly erroneous."¹⁵⁶ I interpret this language to mean the same thing as the weak deference standard: If an interpretation is supportable under weak deference methodology the court would normally follow it, but need not do so.¹⁵⁷ However, the "clearly erroneous" test is ambiguous; it might mean that the court must accept a reasonable agency interpretation with which it disagrees, in which case it would diverge from the mainstream doctrine.¹⁵⁸

154. See *California Ass'n of Psychology Providers v. Rank*, 51 Cal. 3d 1, 11, 270 Cal. Rptr. 796, 800-1 (1990) (independent judgment of interpretation in regulation); *City of Coachella v. Riverside County Airport Land Use Comm'n*, 210 Cal. App. 3d 1277, 1289, 258 Cal. Rptr. 795, 801 (1989) (*Ralphs* test applicable only to substantive merit of the legislative act—court has independent judgment in reviewing interpretation of statutes).

155. Section 11342.2 provides that "no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." CAL. GOV'T CODE § 11342.2 (West 1992).

156. See, e.g., *Adams v. Commission on Judicial Performance*, 8 Cal. 4th 630, 657-58, 34 Cal. Rptr. 2d 641, 658 (1994) (Judicial Council's interpretation of constitutional provision it administers); *Banning Teachers Ass'n v. Public Employment Relations Bd.*, 44 Cal. 3d 799, 804-05, 244 Cal. Rptr. 671, 673-74 (1988); *Rivera v. City of Fresno*, 6 Cal. 3d 132, 140, 98 Cal. Rptr. 281, 285 (1971); *Coronado Yacht Club v. California Coastal Comm'n*, 13 Cal. App. 4th 860, 868, 17 Cal. Rptr. 2d 10, 15 (1993).

157. Thus the California Supreme Court said: "We have generally accorded respect to administrative interpretations of a law and, unless clearly erroneous, have deemed them significant factors in ascertaining statutory meaning and purpose." *Nipper v. California Auto. Assigned Risk Plan*, 19 Cal. 3d 35, 45, 136 Cal. Rptr. 854, 859 (1977) (emphasis added). This language indicates that the Court sees the "clearly erroneous" test as simply another way to state the "deference" test. Similarly, see *San Lorenzo Educ. Ass'n v. Wilson*, 32 Cal. 3d 841, 850, 187 Cal. Rptr. 432, 439 (1982); *Coca Cola Co. v. State Bd. of Equalization*, 25 Cal. 2d 918, 921, 156 P.2d 1, 2-3 (1945); *City of Anaheim v. Workers' Compensation Appeals Bd.*, 124 Cal. App. 3d 609, 613, 177 Cal. Rptr. 441, 443 (1981).

In an early and often quoted decision, the Court seemed to equate the "clearly erroneous" and "weak deference" approaches. *Bodinson Mfg. Co. v. California Employment Comm'n*, 17 Cal. 2d 321, 325-26, 109 P.2d 935, 939 (1941). A number of cases stating the "clearly erroneous" test rely on *Bodinson* or on intervening cases that relied on *Bodinson* and thus presumably endorse the reasoning in that case. See *Banning Teachers Ass'n*, 44 Cal. 3d at 804-05, 244 Cal. Rptr. at 673-74; *Judson Steel Corp. v. Workers Compensation Appeals Bd.*, 22 Cal. 3d 658, 668-69, 150 Cal. Rptr. 250, 256-7 (1978).

158. As it is used in federal practice, the "clearly erroneous" test applies to judicial review of factual determinations of trial judges. This test does not allow a court to substitute its judgment for that of the trial judge. It is more deferential than substitution of judgment but less deferential than the substantial evidence test. See *supra* text accompanying notes 115-123; see also *Concrete*

4. Sanction for Failure to Follow Statutory Procedure

In *Armistead v. State Personnel Board*,¹⁵⁹ the California Supreme Court decided that an agency had adopted an interpretive rule without following the required notice and comment procedures.¹⁶⁰ As a result, it refused to accord the normally appropriate degree of weak deference to the rule. This makes sense: If the public was illegally excluded from the rule-making process, the rule should not receive weak deference since it was adopted without the deliberative process that the legislature intended. Granting weak deference to an illegally adopted rule would flout legislative intent that agencies follow the important but costly rulemaking procedure required by statute and might well encourage agencies to do so.

C. Recommendations

Existing California law on the scope of review of agency decisions of law is basically satisfactory but requires clarification.

1. Clarify Current Law

Current California law on the scope of judicial review of agency interpretations is unclear because it contains two unreconciled strains that might or might not clash with the mainstream independent judgment/weak deference methodology. Some cases suggest that when reviewing legislative regulations, a court must uphold a reasonable agency legal interpretation with which it disagrees, regardless of whether the legislature demonstrably delegated interpretive power to the agency.¹⁶¹ Other cases utilize a "clearly erroneous" test that may be more deferential to the agency than the mainstream weak deference standard.¹⁶² Thus California law contains three lines of case law governing the court's power to review agency legal

Pipe & Prods. v. Construction Laborers Pension Trust, 113 S. Ct. 2264, 2279-80 (1993) (clearly erroneous is a deferential standard but reasonableness is even more deferential).

159. 22 Cal. 3d 198, 204-05, 149 Cal. Rptr. 1, 3-4 (1978); see also *Johnston v. Department of Personnel Admin.*, 191 Cal. App. 3d 1218, 1225, 236 Cal. Rptr. 853, 857 (1987).

160. Unlike federal law, California requires an agency to follow notice and comment rule-making procedures for all rules, legislative and interpretive. See CAL. GOV'T CODE § 11340.5(a) (West Supp. 1995); Michael Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43, 45 (1992).

161. See *supra* text accompanying notes 150-155.

162. See *supra* text accompanying notes 156-158.

interpretations. Some clarification is in order, since this sort of confusion undermines the efficiency objective of a good judicial review system.

Such a clarification could take the form of a Supreme Court opinion or a new judicial review statute.¹⁶³ This clarification should embrace the mainstream weak deference model and should suppress the two possibly inconsistent lines of case law. The weak deference model should apply regardless of whether the agency's interpretation is contained in a formal adjudication or a legislative rule or elsewhere, absent evidence that the legislature intended to delegate interpretive power to the agency. Furthermore, such evidence should be demonstrable; the court should not simply assume that the legislature intended to delegate interpretive power, as has often occurred in the past.¹⁶⁴

2. Weak Deference as Opposed to No Deference

This Article attempts to hold a middle ground: It opposes the strong deference approach of *Chevron*, but it also opposes the view that courts should give agency interpretations no deference at all.¹⁶⁵ The California rule that agency interpretations are entitled to appropriate deference is sensible and should be maintained.¹⁶⁶ The system promotes accurate

163. Weak deference is rather difficult to state in statutory form. It would be preferable to state the idea in a statutory comment to a new statute. For example:

The court is the primary authority on . . . issues [of law] . . . but it shall give appropriate weight to an agency's views concerning those issues. In determining whether and to what extent an agency interpretation deserves weight, the court shall be guided by such factors as the timing and consistency of the agency's position and the nature of the agency's expertise.

A.B.A. Section of Administrative Law, *A Restatement of Scope-of-Review Doctrine*, 38 ADMIN. L. REV. 235, 236 (1986); see also Levin, *supra* note 134, at 242-53, 266-70.

164. See *supra* note 149 (tax cases).

165. The rejected Bumpers Amendment indicated considerable Congressional support for a no-deference position. See Woodward & Levin, *supra* note 134.

166. In an important article, Professor Merrill recast the weak deference model by analogizing it to a system of following precedents. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1003-12 (1992). Administrative interpretations are "executive" precedents. Courts may or may not follow them in the same way that courts may or may not follow judicial precedents of other courts, such as cases decided by courts of co-ordinate jurisdiction or courts of inferior jurisdiction. Thus, a California Court of Appeal for one district probably will follow the precedent of another district, but need not do so if convinced it is incorrect. It might also follow a precedent from another state, but is somewhat less likely to do so. The weak deference factors can be understood as rules that govern this system of executive precedent-following. Thus, for example, an interpretation issued by a low level agency staff member would be entitled to much less precedential weight than one issued by the agency heads in a formally adopted rule or adjudicatory decision—just as the opinion of an inferior court would be entitled to less precedential weight than a court at the same level. Merrill's conceptualization of weak deference as a

decisionmaking, is relatively efficient, and is moderately acceptable to regulated parties. It is probably more acceptable to regulatees than the strong deference model but less acceptable than denying any deference to agency interpretations.

The weak deference model promotes accuracy because an agency's qualification to interpret text is often superior to a court's, especially where the materials are technical and engage an agency's expertise. A court may be limited to conventional tools of statutory interpretation, such as the use of dictionaries or ancient canons of construction, but an agency may be more competent to reach an interpretation that reflects legislative intent, furthers the statutory policy, and facilitates enforcement and administration.¹⁶⁷ This is especially so when the agency has maintained the interpretation consistently, announced it contemporaneously with enactment of the statute, and gave it careful and thorough consideration.

Weak deference also promotes uniformity. California judicial review takes place largely in unreported and unreviewed superior court opinions. Knowingly or unknowingly, these courts might generate conflicting interpretations, so that a statute will be enforced differently in different parts of the state until the matter is resolved at the Court of Appeal level (and even then there is a risk of conflicting appellate decisions). Under a weak deference approach, it is more likely that court decisions will be uniform than under a system in which every judge is instructed to deny any deference to an agency's view. Concededly, however, a *Chevron* strong deference approach will promote even greater uniformity.

Another important reason to retain weak deference is that it creates desirable incentives for agencies. Since the chances of an agency interpretation being sustained on review are much greater if the interpretation is thoroughly and carefully reasoned, agencies are encouraged to engage in and articulate such reasoning. In addition, an interpretation that is consistently maintained stands a better chance of being sustained; thus agencies are encouraged to act consistently and honor their precedents. When the agency wishes to change course, weak deference encourages the agency to clearly identify the new approach and justify the departure from prior law.

The weak deference rule has some efficiency advantages as compared to a no-deference rule. Weak deference tends to discourage litigants from seeking judicial review of agency decisions containing legal interpretations,

set of rules for executive precedent-following shows that weak deference is a principled and appropriate way for courts to deal with legal interpretations by agencies.

167. See Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 574-92 (1985).

while pure independent judgment encourages losing litigants to go to court.¹⁶⁸ This is not an advantage, given the heavily overburdened dockets of our trial and appellate courts.

It might be argued that the weak deference approach is relatively inefficient, as compared to a no-deference approach, since it is contextual. Litigants will argue about whether weak deference factors are present in a given case and how those factors point. In a no-deference regime, such factors would be ignored, which may seem tidier. It is true that a court called on to employ weak deference methodology must assess and then balance numerous factors. This makes such decisions somewhat unpredictable and may even give them an ad hoc quality. Indeed, the factors may be used as makeweights, slapped on by a court only after it decides what it actually wants to do.

The reality is, however, that this untidiness is inherent in the process of statutory interpretation. Courts seeking to interpret text reach out for all sorts of clues. They may rely on dictionaries, public policies, legislative purposes (real or imputed), legislative history, or canons of construction. Weak deference methodology simply cranks some additional highly pertinent factors into the equation.

Opponents of weak deference base their arguments on concerns for agency bias. To many people, the agency is just another litigant with a special interest, and they consider it unfair (and thus unacceptable) to favor the views of one litigant over others. It may be that agencies will habitually interpret legal texts so as to maximize their jurisdiction or to favor the law enforcement point of view. If courts treat the agency's view like any other litigants, this source of institutional bias can be counteracted. Although there is some validity to this argument, I believe it would be a mistake to accept it. The accuracy-based arguments in favor of according weak deference to agency interpretations, where the context requires it, are too persuasive.

Still the bias critique is a good reason for rejecting the *Chevron* strong-deference methodology in which a court must always accept an agency's reasonable view of the meaning of an ambiguous text. That approach gives a court very little power to counteract a perceived agency power-grab. In contrast, the beauty of weak deference is that it is contextual and allows the court to grant deference where appropriate and deny it where it is inappropriate. Where the preconditions for weak deference are absent, courts

168. See *supra* text accompanying note 99 (same problem with independent judgment of facts).

should not grant any special weight to the agency's view—and that will often be the case in connection with statutory interpretations that radically expand the agency's jurisdiction or which raise serious constitutional concerns.

3. Weak Deference as Opposed to Strong Deference

The *Chevron* (or strong deference) doctrine requires a court to uphold an agency interpretation of ambiguous text, based on the theory that Congress signalled its intention to delegate interpretive power by having enacted an ambiguous statute.¹⁶⁹ There has been an immense outpouring of scholarship about *Chevron*, much of it critical,¹⁷⁰ and a vast number of cases following in its wake. I cannot explore the issue fully here, but in my view *Chevron* is flawed for both practical and theoretical reasons.

On a practical level, the *Chevron* rule seems unworkable. This unworkability is evidenced by the fact that the Supreme Court itself conveniently ignores *Chevron* in many, perhaps most, situations to which it apparently applies.¹⁷¹ Under the two-step *Chevron* methodology, a court must first decide whether a statute is ambiguous. The court apparently does not use the weak deference factors in deciding whether the statute is ambiguous nor in interpreting an unambiguous statute. If the statute is ambiguous, a court is then required to give strong deference to the agency's view—that is, by upholding any reasonable interpretation.

169. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). According to one study, eleven states have adopted tests that seem closely analogous to *Chevron*. See McGrath et al., *supra* note 11, at 763–66.

170. For a sampling of the scholarship critical of *Chevron* see, for example, BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* 701–10 (3d ed. 1991); Merrill, *supra* note 167; Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for Chevron U.S.A. v. Natural Resources Defense Council*, 1991 WISC. L. REV. 1275; Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990); Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1026–43; Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Breyer, *supra* note 143, at 372–82.

For scholarship supportive of *Chevron*, see, e.g., 1 DAVIS & PIERCE, *supra* note 22, at 107–31; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989); Richard J. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1117–29 (1987) (*Chevron* disturbing but understandable in light of Court's managerial need to decrease conflict between lower courts); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283 (1986).

171. Merrill, *supra* note 167, at 980–85.

Since it is unlikely that an agency's construction will be found unreasonable, *Chevron* shifts the battle to step one—is the statute ambiguous? Here, we find Supreme Court majority and dissenting opinions battling over whether a particular statute is ambiguous. Justices who want to overturn the agency's construction are forced into a disingenuous argument that the statute has a plain meaning.¹⁷² The *Chevron* two-step methodology is a good example of an on-off switch that complicates the judicial review function and diverts the courts into arguing about a peripheral issue. It either gives too much weight (step one) or too little weight (step two) to the judiciary's independent views.

Similarly, the Court seems unable to resolve whether *Chevron* covers every possible agency interpretation.¹⁷³ Does it cover interpretive rules adopted without notice and comment?¹⁷⁴ Advice letters from agency staff?¹⁷⁵ Interpretations that arise from taking enforcement action?¹⁷⁶ Issues with strong constitutional overtones?¹⁷⁷ Issues previously resolved by court decisions but reopened by new agency interpretations?¹⁷⁸ Assertions in the agency's brief?¹⁷⁹ If it does not cover all of these agency interpretations, how does the *Chevron* theory that ambiguity always entails delegation allow us to distinguish between them?

172. See, e.g., *Dole v. United Steelworkers*, 494 U.S. 26 (1990) (7-2 split over whether Paperwork Reduction Act is ambiguous). The Supreme Court and lower courts have reached no consensus on what sources can be consulted in deciding the ambiguity question—legislative history? other provisions in the statute or related statutes? statutory intent and purpose? the weak deference factors?

173. For a handy summary of the areas of uncertainty and possible exceptions to *Chevron*, see Timothy B. Dyk & David Schenck, *Exceptions to Chevron*, 18 ADMIN. L. NEWS 12 (1993).

174. See Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?* 7 YALE J. ON REG. 1, 55-58 (1990). The Supreme Court has hinted that *Chevron* may not apply to interpretive rules. *Stinson v. United States*, 113 S. Ct. 1913, 1918-19 (1993) (*Chevron* not applicable to Sentencing Commission interpretations of its guidelines, but they should be followed under weak deference principles).

175. Yes. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 647-52 (1990). But see Anthony, *supra* note 174, at 58-60.

176. Yes. *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156-57 (1991) (court should defer to views of Secretary of Labor as expressed in a litigating position rather than views of Review Commission).

177. No. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Yes. *Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991).

178. No, at least if the prior decision came from the Supreme Court. *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841, 847-48 (1992); *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 130-31 (1990). But quite possibly yes if the prior decision comes from courts below the Supreme Court level, especially if the decision was one upholding a prior agency interpretation as reasonable under *Chevron* Step II. See *Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124 (9th Cir. 1988) (NLRB free to change interpretation upheld by prior court decision).

179. No. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

On a theoretical level, *Chevron* is flawed because it disregards the most fundamental role of courts in our society. *Marbury v. Madison*¹⁸⁰ held that it was the duty of courts to say what the law is—not to defer to reasonable interpretations by the executive branch or to accept passively political decisions by the executive in the form of reinterpretations of the law. *Chevron* allows an agency to determine for itself the boundaries of its jurisdictional authority,¹⁸¹ thus *Chevron* surrenders a vital principle of judicial check.¹⁸² By radically undercutting an important component of our system of checks and balances, *Chevron* mislocates the proper boundary between the powers of administrative agencies and courts.

Finally, *Chevron* is based on the notion that Congress *intended* to delegate interpretive power *every time* it writes an ambiguous statute, regardless of whether it created the ambiguity on purpose or accidentally or whether the ambiguity concerned a question of policy or an issue of law better suited to judicial rather than administrative resolution.¹⁸³ This so-called delegation is a complete fiction and is probably a false description of Congressional intent.¹⁸⁴

4. Conclusion

A system of pure independent judgment without any deference would result in inferior interpretations in the numerous situations in which agencies have a comparative interpretive advantage. Yet *Chevron*-style strong deference is both unworkable and an abdication of judicial responsibility. Courts should have the responsibility for articulating the correct inter-

180. 5 U.S. (1 Cranch) 137, 177 (1803).

181. See generally Quincy M. Crawford, Comment, *Chevron Deference to Agency Interpretations that Delimit the Scope of the Agency's Jurisdiction*, 61 U. CHI. L. REV. 957 (1994).

182. See Farina, *supra* note 170, at 476-99. In *McHugh v. Santa Monica Rent Control Bd.*, 49 Cal. 3d 348, 261 Cal. Rptr. 318 (1989), the California Supreme Court upheld a delegation to a local agency to adjudicate excess rent claims and assess penalties (but not a provision allowing tenant withholding of excess rent). Agency adjudication of rent claims was upheld because the essential judicial checking power was maintained. *Id.* at 361-62, 261 Cal. Rptr. at 325-26. However, the rent withholding power was overturned because it was self-executing and thus frustrated judicial review. *Id.* at 376, 261 Cal. Rptr. at 336. *McHugh* at least raises the question of whether *Chevron* would be consistent with the separation of powers provisions of the California constitution.

183. See Breyer, *supra* note 143, at 373-77.

184. See Farina, *supra* note 170, at 468-76. The near-passage of the Bumpers Amendment, which would have abolished even *weak deference*, at least suggests that Congress would not vote for the proposition that courts must invariably accept reasonable agency interpretations of ambiguous statutes that courts disagree with. Although it ultimately failed of passage, the Bumpers Amendment passed the Senate 94-0 and won approval from both House and Senate Committees. *Id.* at 473-74; Woodward & Levin, *supra* note 134.

pretation, regardless of whether the agency's interpretation is reasonable and regardless of the format in which the agency's interpretation occurs. California's present system of weak deference strikes the right balance. That methodology should be preserved and, where necessary, the existing law should be clarified.

III. JUDICIAL REVIEW OF AGENCY APPLICATIONS OF LAW TO FACT

A. Introduction

In virtually every adjudicatory decision, an agency must *apply* a legal standard to the basic facts. Such applications of law to fact are sometimes called "ultimate conclusions," "ultimate facts," "legal inferences," or "mixed questions of law and fact." It has always been a puzzle whether to judicially review such applications as questions of law or questions of fact or questions of discretion. The issue is important, since it implicates the fundamental question of allocation of responsibility between courts and agencies and does so in a high percentage of adjudicated cases.

Determining the scope of review of applications of law to fact is a problem that extends far beyond the confines of administrative law and pervades the field of civil and criminal procedure. For example, is an application question one that should go to the jury or is it for the trial judge to decide? In reviewing a jury decision, can the reviewing court substitute its judgment for the jury's on an application question or must it uphold a reasonable jury determination? The issue has been extensively studied, both in the literature on administrative law and in procedure generally,¹⁸⁵

185. See generally George C. Christie, *Judicial Review of Findings of Fact*, 87 NW. U. L. REV. 14 (1992); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 232-39 (1985). For administrative law perspectives on the problem, see *NLRB v. Marcus Trucking Co.*, 286 F.2d 583, 590-91 (2d Cir. 1961) (controversy is old one, distinctions are fuzzy); 5 KENNETH C. DAVIS, *ADMINISTRATIVE LAW TREATISE* 365-94 (2d ed. 1984) (the 1994 third edition of the Treatise does not discuss the issue); LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 546-94 (1965); SCHWARTZ, *supra* note 170, at 689-701; Levin, *supra* note 146; Stern, *supra* note 118, at 93-109; Ray A. Brown, *Fact and Law in Judicial Review*, 56 HARV. L. REV. 899 (1943); Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111 (1924).

but there is no simple answer to the question of how application questions should be classified.¹⁸⁶ Result-oriented cases abound.¹⁸⁷

How application issues are classified by courts in administrative law cases depends significantly on how courts decide to review questions of basic fact and questions of law. If a court applies the "independent judgment" test to questions of basic fact,¹⁸⁸ it would probably substitute judgment with respect to both issues of application and basic facts. Nevertheless, the issue of how to classify application issues remains important, even in independent judgment cases, at the level of appellate court review. An *appellate* court's scope of review of the *trial* court's independent judgment decision depends on whether the application issue is treated as law or fact. If the application question is considered a factual issue, the appellate court has a very restricted scope of review of the trial court's decision.¹⁸⁹ If the application question is considered a question of law, however, the appellate court has a much broader review power over the trial court's decision.¹⁹⁰

186. Dickinson wrote that matters of law and fact are not two mutually exclusive *kinds* of questions, based upon a difference of subject-matter. Matters of law grow downward into roots of fact, and matters of fact reach upward, without a break, into matters of law. The knife of policy alone effects an artificial cleavage at the point where the court chooses to draw the line between public interest and private right.

JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 55 (1927).

187. A rare example of judicial candor:

[T]he appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive. . . . [T]he Court has yet to arrive at "a rule or principle that will unerringly distinguish a factual finding from a legal conclusion."

. . . Perhaps much of the difficulty in this area stems from the practical truth that the decision to label an issue a "question of law," a "question of fact," or a "mixed question of law and fact" is sometimes as much a matter of allocation as it is of analysis. . . . At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.

Miller v. Fenton, 474 U.S. 104, 113-14 (1985) (citations omitted). Similarly, see Pullman-Standard v. Swint, 456 U.S. 273, 288, 289 n.18 (1982).

188. See *supra* Part I.

189. See *supra* text accompanying notes 37-39.

190. See Lacy v. California Unemployment Ins. Appeals Bd., 17 Cal. App. 3d 1128, 1133-34, 95 Cal. Rptr. 566, 568-69 (1971) (whether employee's actions are "misconduct" is question of fact, appellate court has narrow scope of review); David Kikkert & Assoc., Inc. v. Shine, 6 Cal. App. 3d 112, 116, 86 Cal. Rptr. 161, 163 (1970) (facts undisputed—whether licensee's actions are "unfair practice" or whether it failed to deal "openly, fairly, and honestly" are questions of law); Caro v. Savage, 201 Cal. App. 2d 530, 541, 20 Cal. Rptr. 286, 292-93 (1962) (scope of appellate review varied as to different parties in same case because facts were disputed as to some parties but not others).

Similarly, the manner in which courts review agency decisions of law impacts on the way in which application decisions are reviewed. If the court applies the *Chevron* principle,¹⁹¹ under which it must affirm a reasonable agency interpretation of ambiguous legal text, it would presumably review application decisions under a reasonableness standard as well. However, this section assumes that *Chevron* will not be applied and that courts will use the weak deference approach to reviewing agency legal interpretations.¹⁹²

Perhaps an example of a typical application issue would be helpful to set the discussion in context. Suppose a workers' compensation case in which the question is whether an injury resulting from an accident was one "arising out of and in the course of the employment."¹⁹³ Deciding such a case involves a three-step analysis. An agency must establish basic facts and abstract principles of law. Then it must apply that law to those facts.¹⁹⁴

Step one involves finding the basic facts. Typical basic fact findings are determinations of what happened (or will happen in the future), when did it happen, what was the state of mind of the participants and the like. Some basic facts are established by direct testimony, some by inference from circumstantial evidence. For example, suppose the agency finds, either from direct or circumstantial evidence, that E, an employee of R, was driving home from a night school course at the time of the accident. R paid for the cost of night school and encouraged but did not require E to take the courses. Determinations of basic fact such as these can be made without knowing anything of the applicable law.¹⁹⁵ The court reviews such determinations under the substantial evidence standard.¹⁹⁶ In many cases, the basic facts will be disputed; in others, they will be stipulated or undisputed.

Step two requires decision on abstract legal issues that can be resolved without knowing anything of the basic facts of this case. For example, is an injury that occurs while an employee is driving to or from home auto-

191. See *supra* text accompanying notes 169-184.

192. See *supra* Part II.

193. CAL. LAB. CODE § 3600(a) (West 1989 & Supp. 1995).

194. See Monaghan, *supra* note 185, at 235-36, for an excellent treatment of the three-step analysis; see also HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 374-76 (tentative ed. 1958); Stern, *supra* note 118, at 96-99.

195. JAFFE, *supra* note 185, at 548.

196. Of course, under existing California law, many agency factual findings are reviewed under the independent judgment test. However, independent judgment has never applied to the Workers' Compensation Appeals Board as it is a constitutional agency.

matically excluded from workers' compensation? At the other extreme, is such an injury automatically included if there is any factual connection to employment? Or perhaps an injury is covered if the trip is "reasonably contemplated by the employment." Determining the test in the abstract is a question of law. Often, this sort of determination involves the adoption of refinements or narrowing constructions of an existing and more general test.¹⁹⁷ If the test adopted is one that calls for analysis of various factors, the determination of what factors must or must not be taken into account is a question of law. These issues require analysis of the statutory language and statutory purpose without any reference to the facts of the instant case. The agency's determination of questions of law is independently reviewable by a court under the weak deference approach.¹⁹⁸

Third, the agency must *apply* the general law to the basic facts. Assume that in stage two, the court decided to follow the "reasonably contemplated by the employment" approach rather than the two polar extremes and failed to adopt any narrowing construction of this test. That leaves a difficult issue of application—whether *this employee's* trip home from a night class was one reasonably contemplated by the employment.¹⁹⁹ Unlike the general process of law declaration described in the second step, this step involves situation-specific law application;²⁰⁰ because the legal test is vague, it also calls for the use of judgment, discretion, and expertise. Suppose, for example, that the agency decides that E was in the course of employment at the time of the accident because attendance at night school was reasonably contemplated by the job. That decision might justifiably be reviewed independently by the court (as if it were a question of law) or only for rationality (as if it were a decision of fact or discretion).²⁰¹ Such application decisions are the focus of this section.

197. Monaghan, *supra* note 185, at 236–37.

198. See *supra* Part II.

199. If either polar extreme was adopted—that such a trip was either always or never covered by workers' compensation—the application question would be quite simple. The employee is clearly covered or clearly not covered.

200. "[I]n contrast to the generalizing feature of law declaration, law application is situation-specific; any ad hoc norm elaboration is, in theory, like a ticket good for a specific trip only." Monaghan, *supra* note 185, at 236.

201. The example is taken from *Dimmig v. Workmen's Compensation Appeals Bd.*, 6 Cal. 3d 860, 864–65, 101 Cal. Rptr. 105, 107–08 (1972), holding that since the facts were undisputed, the resolution of the question of application should be treated as a question of law as to which the court could substitute its judgment. That has been the consistent approach of the California courts in resolving this issue. *Santa Rosa Junior College v. Workers' Compensation Appeals Bd.*, 40 Cal. 3d 345, 351, 220 Cal. Rptr. 94, 97 (1985). However, federal law treats the scope of employment issue as one of fact whether the facts are disputed or undisputed. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507–08 (1951).

B. Existing California Law

California law usually relies on a rule of thumb to identify the appropriate scope of judicial review of application questions—whether they arise in administrative law or elsewhere. Under this approach, an application question should be reviewed as a question of fact *if the basic facts of the case are disputed*, whether the dispute concerns matters of direct testimony²⁰² or matters of inference²⁰³ from circumstantial evidence.²⁰⁴ However, if there is no dispute of basic facts (whether those facts were established by direct or circumstantial evidence), but the application question is disputed, the agency's determination is reviewed as a question of law.²⁰⁵

Some California cases treat the decision of what scope of review is appropriate for application questions as a question of policy, to be resolved independently of whether the basic facts are disputed; it may be that this approach has supplanted the rule of thumb approach based on the disput-

202. *Board of Educ. v. Jack M.*, 19 Cal. 3d 691, 698 n.3, 139 Cal. Rptr. 700, 703 n.3 (1977). In the *Jack M.* case, the issue was whether an arrest for homosexual solicitation rendered a teacher "unfit to teach." The direct testimony concerning this incident conflicted sharply. The case involved an action in superior court, not judicial review of administrative action. The Supreme Court held that "unfitness to teach" was a factual issue and affirmed the trial court decision under the substantial evidence test, apparently because the basic facts were disputed. *Jack M.* also suggested a different and even less satisfactory approach to the problem. See *infra* text accompanying note 207.

203. "Inferences" are factual conclusions logically derived from circumstantial evidence. CAL. EVID. CODE § 600(b) (West 1966). Using a conventional example, suppose the question to be proved is whether B killed C. If A testifies that he saw B kill C, A's evidence is direct. If A testifies that he saw B fleeing with a gun from C's house, A's evidence is circumstantial. By the process of "inference," A's evidence proves that B killed C, even though A did not see the deadly deed. See 1 CHARLES T. MCCORMICK ET AL., MCCORMICK ON EVIDENCE 777 (John W. Strong ed., 4th ed. 1992).

204. *Holmes v. Kizer*, 11 Cal. App. 4th 395, 400-01, 13 Cal. Rptr. 2d 746, 749 (1992) (whether medication was "medically necessary" and consistent with "current prescribing practices" are questions of fact because inferences in dispute); *Halaco Eng'g Co. v. South Cent. Coast Regional Comm'n*, 42 Cal. 3d 52, 74-77, 227 Cal. Rptr. 667, 681-83 (1986) (inferences disputed, so whether applicant had "vested right" was question of fact); *Interstate Brands v. Unemployment Ins. Appeals Bd.*, 26 Cal. 3d 770, 774 n.2, 163 Cal. Rptr. 619, 621 n.2 (1980) (was work stoppage "reasonably foreseeable?"—facts largely undisputed but did not "all point one way").

205. See, e.g., *Dimmig v. Workmen's Compensation Appeals Bd.*, 6 Cal. 3d 860, 864-65, 101 Cal. Rptr. 105, 107-08 (1972) (is accident in the course of employment—law since facts undisputed); *Borello & Sons v. Department of Indus. Relations*, 48 Cal. 3d 341, 349, 256 Cal. Rptr. 543, 547 (1989) (are "sharefarmers" "employees" or "independent contractors"—law since facts undisputed); *Yakov v. Board of Medical Examiners*, 68 Cal. 2d 67, 74 n.7, 64 Cal. Rptr. 785, 791 n.7 (1968) (whether doctor's conduct involves "moral turpitude"). But see *Young v. California Unemployment Ins. Appeals Bd.*, 37 Cal. App. 3d 607, 610, 112 Cal. Rptr. 460, 463 (1974) (undisputed facts—whether employee left work "voluntarily" is question of fact).

ed/undisputed fact distinction.²⁰⁶ Other cases articulate a different and somewhat mystifying test based on whether the conclusion can be reached by logical reasoning from the evidence as opposed to application of legal principles. In the former case, the issue is one of fact; in the latter case, it is one of law.²⁰⁷ This test, if it can be called that, begs the question. Application issues are decided *both* by logical reasoning from evidence *and* applying legal principles. Still other cases resolve the matter by simple fiat²⁰⁸ or overlook the issue entirely.²⁰⁹

206. *Twentieth Century Ins. Co. v. Garamendi*, 8 Cal. 4th 216, 271, 32 Cal. Rptr. 2d 807, 841 (1994), articulated the test by quoting with approval from *Crocker Nat'l Bank v. City of S.F.*, 49 Cal. 3d 881, 888, 264 Cal. Rptr. 139, 142-43 (1989). It did not mention the disputed/undisputed fact methodology.

In *Crocker*, the California Supreme Court held that whether an item is a "fixture" for tax purposes is a question of law, even though the key factual question was highly disputed.

If the pertinent inquiry [in classifying an application question] requires application of experience with human affairs, the question is predominantly factual and its determination is reviewed under the substantial-evidence test. If, by contrast, the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and its determination is reviewed independently.

Crocker, 49 Cal. 3d at 888, 264 Cal. Rptr. at 142-43. *Crocker* in turn cited *People v. Louis*, 42 Cal. 3d 969, 984-88, 232 Cal. Rptr. 110, 118-21 (1986), which engaged in a nuanced, policy-oriented treatment of the scope of review issue in criminal procedure.

207.

In theory, a determination is one of ultimate fact if it can be reached by logical reasoning from the evidence, but one of law if it can be reached only by the application of legal principles. . . . Under this analysis, fitness to teach is probably a question of ultimate fact. Although resort to legal principles is necessary to establish that fitness to teach, instead of immorality or moral turpitude, is the crucial issue, the determination of fitness to teach flows from the evidence itself without further resort to legal principles.

Board of Educ. v. Jack M., 19 Cal. 3d 691, 698 n.3, 139 Cal. Rptr. 700, 703 n.3 (1977) (citations omitted). *Jack M.* drew this test from a rather obscure doctrine requiring courts to make findings of ultimate facts which, in turn, required a distinction between ultimate facts and conclusions of law. See *Hayward Lumber & Inv. Co. v. Construction Prods. Corp.*, 110 Cal. App. 2d 1, 2-4, 241 P.2d 1054, 1055-56 (1952).

208. See *Lindros v. Governing Bd. of Torrance Unified Sch. Dist.*, 9 Cal. 3d 524, 532-34, 108 Cal. Rptr. 185, 190-91 (1973) (whether stated cause for refusal to rehire probationary teacher "relates solely to the welfare of the schools and the pupils thereof" is a question of law for the court); *Bekiaris v. Board of Educ. of Modesto*, 6 Cal. 3d 575, 587-89, 100 Cal. Rptr. 16, 22-24 (1972) (same). These cases made an unannounced change from prior cases which appeared to treat this issue as one of fact or discretion rather than as one of law. *Griggs v. Board of Trustees of Merced Union High Sch. Dist.*, 61 Cal. 2d 93, 96, 37 Cal. Rptr. 194, 197 (1964).

209. See, e.g., *Pasadena Unified Sch. Dist. v. Commission on Professional Competence*, 20 Cal. 3d 309, 314, 142 Cal. Rptr. 439, 441-42 (1977). The issue in this case was whether an "emergency" existed that justified involuntary transfer of a teacher. The court treated this issue as a question of fact, subject to independent judgment, even though the basic facts were undisputed. There was no discussion of why the court ignored the normal methodology which would have treated the issue as a question of law. The effect of treating it as a question of fact, not law, was that the appellate court had very restricted power to review the trial court's decision. See *supra* text accompanying notes 37-39. Similarly, see *Santa Rosa Junior College v. Workers'*

C. Recommendation

1. Abandon the Rule of Thumb

California's rule of thumb approach to classifying application issues is misguided and oversimplified.²¹⁰ Why should the identical application question be treated as a question of fact in one case and a question of law in another because of the happenstance that the facts are disputed in the first case but not the second?²¹¹ The California test also invites manipulation; a party can control the scope of judicial review of an application issue by either disputing basic facts or stipulating to undisputed facts.

Moreover, the California rule is difficult to apply because of inconsistent treatment of disputed factual inferences from the direct testimony; sometimes the dispute about inferences causes the application question to be treated as one of fact, sometimes as one of law.²¹² The disputed/undisputed fact approach was rejected by the federal courts long ago,²¹³ and it deserves a dignified burial in California as well. The rule of thumb may make sense in dividing responsibility between trial and appellate judges, or between judges and juries, but it makes no sense at all in dividing responsibility between courts and administrative agencies. The test is both fortuitous and indeterminate, which makes it unacceptable under the criteria of

Compensation Appeals Bd., 40 Cal. 3d 345, 355-56, 220 Cal. Rptr. 94, 100-01 (1985) (issue of law although inferences from basic facts disputed).

210. See WITKIN, *supra* note 39, §§ 241-242 (often impossible to decide whether issue is one of fact or law); 1 JON B. EISENBERG ET AL., CALIFORNIA PRACTICE GUIDE: CIVIL APPEALS AND WRITS § 8.3 (distinction often subtle and blurred); Victor S. Netterville, *Administrative "Questions of Law" and the Scope of Judicial Review in California*, 29 S. CAL. L. REV. 434, 435-36 (1956) (inquiry into what courts do results in intellectual chaos); *Yordamlis v. Zolin*, 11 Cal. App. 4th 655, 660, 14 Cal. Rptr. 2d 225, 228 (1992) (majority and dissent disagree about which scope of review rule applies to DMV case); *Lacy v. California Unemployment Ins. Appeals Bd.*, 17 Cal. App. 3d 1128, 1134, 95 Cal. Rptr. 566, 569 (1971) ("Many issues might with equal force be classed as questions of law or fact.").

It is possible that the California Supreme Court has sub silentio disapproved this approach. See *supra* note 206.

211. Illustrative is *Board of Educ. v. Jack M.*, 19 Cal. 3d 691, 139 Cal. Rptr. 700 (1977) (discussed *supra* note 202). The issue is whether an arrest for homosexual solicitation rendered a teacher "unfit to teach." Under the prevailing methodology, this is a question of fact if the basic facts are disputed (i.e., did the teacher actually do what he was arrested for), but a question of law if the basic facts are undisputed (i.e., the teacher concedes he made the solicitation in question). In *Jack M.* the facts were disputed; in the earlier case of *Morrison v. State Bd. of Educ.*, 1 Cal. 3d 214, 238, 82 Cal. Rptr. 175, 193 (1969), the facts were undisputed, so the court suggested that fitness to teach presented a question of law. This makes no sense.

212. See *supra* notes 203-204, 209.

213. *Gray v. Powell*, 314 U.S. 402, 412 (1941); *United States v. Louisville & Nashville R.R.*, 235 U.S. 314, 320-21 (1914).

accuracy, efficiency, and acceptability. The question remains, however, of what approach might be better.

2. Treat Applications as Questions of Law

Application questions should be treated as questions of law.²¹⁴ Under this approach, reviewing courts would have the power to exercise independent judgment over application decisions by agencies. As in cases involving pure questions of law, a reviewing court would be required to proceed under the rules of weak deference.²¹⁵ Therefore, in appropriate cases (to be defined below), a court should give weight to an agency's application decision. However, if the legislature demonstrably delegated primary responsibility to the agency to apply law to facts, the agency's application should be reviewed only for reasonableness, not independently.

Treating application questions as questions of law for review purposes is consistent with recent case law in the state of Washington²¹⁶ and the recommendations of influential commentators.²¹⁷ Application decisions often are treated as precedents for future cases, thus resembling issues of law more than fact.²¹⁸ More importantly, by treating application issues as questions of law subject to weak deference, we can achieve a discriminating and policy-oriented approach to the scope of review question. The weak deference methodology allows a court to give deference where it is appropri-

214. This recommendation is intended to apply only to administrative law, not to deciding whether issues should be allocated to the trial judge or jury. Thus, certain issues such as whether a defendant's conduct was "negligent" would continue to be decided by juries but would be treated as issues of law in administrative cases. See *Mamiye Bros. v. Barber S.S. Lines, Inc.*, 360 F.2d 774, 776-77 (2d Cir. 1966) (whether conduct added up to negligence appropriately treated as question of law on review of trial judge's decision).

215. See *supra* Part II.

216. In Washington, application issues are reviewed as questions of law, even if the basic facts are disputed, but substantial weight is accorded the agency's view of the law if it falls within its expertise. The leading case is *Franklin County Sheriff's Office v. Sellers*, 646 P.2d 113, 117 (Wash. 1982), cert. denied, 459 U.S. 1106 (1983) (application of bona fide occupational qualification exemption to antidiscrimination statute is a question of law). Similarly, see *Macey v. State Dep't of Employment Sec.*, 752 P.2d 372, 374-75 (Wash. 1988) (whether facts establish "misconduct" in unemployment compensation is question of law).

217. See JAFFE, *supra* note 185, at 553-54.

218. For example, consider the cases reviewing precedent decisions of the Unemployment Insurance Appeals Board at the instance of a third party who objects to the precedent. The court reviews the application of law to fact in a precedent decision as a question of law as if it were contained in a regulation. *Pacific Legal Found. v. Unemployment Ins. Appeals Bd.*, 29 Cal. 3d 101, 109, 172 Cal. Rptr. 194, 197 (1981) (claimant's action in seeking work met standard in regulations); *American Fed'n of Labor v. California Unemployment Ins. Appeals Bd.*, 23 Cal. App. 4th 51, 28 Cal. Rptr. 2d 210 (1994) (refusal to take drug test was "misconduct").

ate and deny deference where it is not, just as it does on questions of legal interpretation. And it is an approach that is relatively easy to explain and to articulate in a statutory revision of California's APA.

By treating application questions as law, we can avoid having to distinguish between pure questions of law and questions of application. The former are general, the latter are specific, but it is often difficult to know which is which, particularly when a court engages in a narrowing construction of a general rule. Often the particular question can be phrased in a general or a specific way without really changing the question at all. For example, the famous *Hearst* case²¹⁹ involved the question of whether newsboys were "employees" and thus entitled to unionize under the National Labor Relations Act. This question can be stated "are newsboys employees" (general) or "are these newsboys employees" (specific), yet it really is the same question. If both are questions of law, there is no need to discriminate between them.

Of course, this approach might create the opposite problem: distinguishing application questions from questions of fact which are reviewed under substantial evidence. I believe, however, that this distinction will not usually be problematic. Fact questions are ones that can be answered without knowing anything of the applicable law or legal standards (i.e., what do these newsboys do, who controls their work, etc.). It should not be difficult to distinguish them from application issues.

3. Application of Weak Deference Methodology to Application Questions

If application questions are questions of law, it is necessary to specify when courts should accord deference to agency applications and when they should substitute judgment without giving deference. All of the factors discussed in the preceding section on weak deference²²⁰ are pertinent here. These are the factors that suggest that (i) the particular agency application is likely to be correct, or that (ii) an agency has a comparative advantage by reason of expertise or specialization over a generalist court in applying the law to the facts.

Thus, a court should give greater deference to an agency application if an agency has consistently applied the law in the same manner than if it has been inconsistent and failed to explain the reason for the inconsistency.

219. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944).

220. See *supra* text accompanying notes 136-144.

It should give greater deference to applications consistent with those made contemporaneously with enactment of the statute. And it should give greater deference to thoughtful and carefully reasoned application decisions, less to hasty or carelessly considered ones.

Deference is particularly appropriate when the agency has a comparative advantage over the court in applying law to facts. In particular, agencies may be more competent to apply legal standards to the basic facts where the case falls into the administrative routine and the legal standard is relatively indeterminate.²²¹ In this situation, an agency's competence arises out of the twin factors of expertise and specialization. Agencies frequently develop expertise in the particular area under consideration that is not available to generalist courts.²²² This expertise (which may concern technical matters like marine biology or economic matters like labor conditions on the farm) is useful in all aspects of agency operation—finding facts, making policy, interpreting law, exercising discretion, and applying law to facts. Moreover, in the sort of cases under discussion, agencies specialize in applying the statute to widely varying factual patterns. This specialization gives them a comparative advantage over courts that see the problem only occasionally. Because the agency specialists see all of the numerous variations on the basic statutory theme, they are more likely to produce consistent and correct applications than courts.²²³

Typical of the sorts of cases in which agencies have superior competence to courts are those in which the cases recur frequently, the fact patterns presented to the agency vary considerably, the law is vague, and application of the test calls for considerable judgment and discretion. There are countless issues of this kind: is a worker an employee, was she

221. Some California cases appear to give insufficient deference to the agency's view when they treat applications as questions of law because the facts are undisputed. See, e.g., *A. H. Robins Co. v. Department of Health*, 59 Cal. App. 3d 903, 907-09, 130 Cal. Rptr. 901, 903-06 (1976) (non-deferentially deciding that drug company's price structure was "discriminatory").

222. See *Andersen*, *supra* note 122, at 559 (if dispute concerns the meaning or purpose of a statute, more intensive review is appropriate; if dispute concerns the meaning or weight of facts within an agency's area of expertise, less intensive review is appropriate).

223. See *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944). In *Crocker Nat'l Bank v. City of S.F.*, 49 Cal. 3d 881, 888, 264 Cal. Rptr. 139, 142-43 (1989), the Court stated: "If the pertinent inquiry requires application of experience with human affairs, the question is predominantly factual and its determination is reviewed under the substantial-evidence test." This language was recently cited with approval by the Supreme Court in dictum that might foreshadow adoption of the *Crocker* test as the general rule. See *supra* note 206. While I think all application issues should be treated as questions of law, I would agree with the court that considerable deference should be accorded to an agency's application decision that turns on its "experience with human affairs."

within the scope of employment,²²⁴ was gender a "bona fide occupational qualification" in the job, was she discharged for misconduct, did she have good cause to quit? Did a licensee commit fraud, unprofessional conduct, gross negligence, acts of moral turpitude? Would it be in the public interest to grant a license? Since these cases are relatively fact-specific, each one is unlikely to have much precedential value, which is also an argument for according deference to the agency's view.²²⁵

In contrast, where a competence analysis would suggest that courts have a comparative advantage in deciding the question, courts should grant little or no deference to the agency's application. These are cases in which the agency does not specialize in applying the particular provision of law and in which its expertise is of no particular value. For example, a court may have a comparative advantage over the agency in applying overarching statutes (like the Public Records Act) or common law²²⁶ or constitutional law²²⁷ to the facts. Even if it is unclear which entity has a comparative advantage in applying such texts, it may be appropriate for courts to discharge their traditional role as explicators of these bodies of law.²²⁸ And it may be that courts should independently decide application questions that are perceived to be of significant public importance or which will be important precedents,²²⁹ or with respect to which a court senses a serious risk of agency abuse.²³⁰ The strength of the weak deference approach is

224. This was the example used in the introduction to this section. See *supra* text accompanying notes 194–195. California cases treat the question of whether an employee is in the course of employment for workers' compensation purposes as a question of law if the facts are undisputed.

225. See *Campbell v. Merit Sys. Protection Bd.*, 27 F.3d 1560, 1566 (Fed. Cir. 1994) (because cases on whether a candidate is "independent" will be highly fact-specific and thus useless as precedents, deferential standard of review should be used).

226. See, e.g., *SEC v. Chenery Corp.*, 318 U.S. 80, 88–90 (1943) (court substitutes judgment on issue of whether common law fiduciary principles applied to facts). In *McPherson v. Employment Div.*, 591 P.2d 1381, 1386 (Or. 1979), the court distinguished common law questions from vague statutory terms that the legislature intended the agency to explicate like "good cause." It explained that the court may substitute judgment in reviewing the former type of decision but must review the latter under an abuse of discretion standard.

227. See *People v. Louis*, 42 Cal. 3d 969, 984–88, 232 Cal. Rptr. 110, 118–21 (1986) (whether a prosecutor met the standard of "due diligence" in locating a witness should be treated as a question of law, not fact, in part because of the significant constitutional overtones).

228. Levin, *supra* note 146, at 51–55; Monaghan, *supra* note 185.

229. A famous example is *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322, 324–25 (1951), using independent judgment to decide whether the CIO was a "union" whose officers had to certify that they were not members of the Communist Party.

230. Historically, courts have decided certain application issues independently because of concern for constitutional rights and doubts about the impartiality of lower courts or juries. See *Bose Corp. v. Consumers Union*, 466 U.S. 485, 498–511 (1984) (actual malice in public-figure defamation case); Stern, *supra* note 118, at 111 (jury not allowed to decide in malicious prosecu-

that it allows the courts to reserve such questions for independent judgment when appropriate.

D. Alternative Schemes

I have not adopted the alternative approaches suggested by a number of cases and commentators. They would resolve application issues through delegation analysis²³¹ through a case-by-case policy analysis,²³² or by treating all application issues as questions of fact.

1. The Delegation Approach

Delegation methodology calls for the court first to decide whether the legislature intended to delegate to the agency primary responsibility, not only to find basic facts, but also to apply the law to the facts. Under this approach, if the court believes that the legislature wanted the agency to bear responsibility for deciding application questions, it must uphold a reasonable agency application of law to fact. But if the court believes that the legislature wanted the court to bear responsibility for deciding the application question, it decides the question independently. This ap-

tion case whether defendant had "probable cause" to sue in a prior case); Christie, *supra* note 185, at 19, 25 (appellate courts independently decide public figure and malice issues as well as obscenity and voluntariness of confessions).

For these reasons, I question the California Supreme Court's decision in *Board of Educ. v. Jack M.*, 19 Cal. 3d 691, 139 Cal. Rptr. 700 (1977) (discussed *supra* note 202), that application of the "fitness to teach" standard should be reviewed as a question of fact when the facts of the case are disputed, but as a question of law if the facts are undisputed. Such decisions are often made by ad hoc adjudicators (like arbitrators or three-person Commissions on Professional Competence) or by other local decisionmakers. Such decisionmakers might be influenced by community sentiment or by homophobia or other prejudices. For policy reasons, this quasi-constitutional issue should be decided by courts as a question of law whether the basic facts are disputed or not. See *Morrison v. State Board of Education*, 1 Cal. 3d 214, 238, 82 Cal. Rptr. 175, 193 (1969), which indicated that the issue should be resolved as a question of law. See also *supra* cases cited in note 208, wisely indicating that the question of whether the stated cause for removal of a probationary teacher "relates solely to the welfare of the schools and the pupils" is a question of law.

231. Levin, *supra* note 146, at 62-63; Stern, *supra* note 118, at 93-109. There are elements of this approach also in JAFFE, *supra* note 185.

232. See *Campbell v. Merit Sys. Protection Bd.*, 27 F.3d 1560 (Fed. Cir. 1994); *Crocker Nat'l Bank v. City of S.F.*, 49 Cal. 3d 881, 888, 264 Cal. Rptr. 139, 142-43 (1989) (discussed *supra* in note 206).

proach is followed in Oregon²³³ and arguably by some important federal decisions.²³⁴

I question the delegation approach for the same reasons that I rejected the *Chevron* principle in California.²³⁵ *Chevron* is based on ascribing to the legislature an intention to delegate primary responsibility to the agency to interpret the law. Yet no such delegation actually exists. Similarly, use of the delegation approach to establish the scope of review for application questions relies upon a fiction,²³⁶ made up for the purpose of explaining and justifying case law that requires courts to uphold reasonable agency applications.

Delegation analysis requires courts to decide just when the legislature would probably have wanted to delegate the responsibility to apply the law. The test calls for an on-off decision; either the legislature delegated or it didn't, and on this distinction turns a very large difference in the resulting intensity of judicial review. This exercise in hypothesis is difficult to explain to the uninitiated, likely to stimulate litigation (because of its on-off character), highly result oriented, and certain to produce confusion as it comes to be applied by the courts—particularly the superior courts who are responsible for most California judicial review.²³⁷ Far better to treat the

233. *McPherson v. Employment Div.*, 591 P.2d 1381, 1386 (Or. 1979).

234. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130-31 (1944); *Gray v. Powell*, 314 U.S. 402, 411 (1941).

The approach of the Model State Administrative Procedure Act of 1981 is unclear. The text of the Model Act confers independent judgment power on courts with respect to both interpretation and application of law, but the comment appears to adopt the delegation approach. The comment reads:

By contrast [to interpretation of the law], with regard to the agency's *application* of the law to specific situations, the enabling statute normally confers some discretion upon the agency. Accordingly, a court should find reversible error in the agency's application of the law only if the agency has improperly exercised its discretion

MODEL STATE ADMINISTRATIVE PROCEDURE ACT OF 1981 § 5-116(c) cmt., 15 U.L.A. 7, 127 (1990). However, this comment is inconsistent with the text of the Model Act which gives the court power of independent judgment with respect to both questions of interpretation and application. *Id.* § 5-116(c)(4), 15 U.L.A. at 127.

235. See *supra* text accompanying notes 169-184; see also SCHWARTZ, *supra* note 170, at 701-10.

236. The leading contemporary exponent of the delegation approach, Professor Ronald Levin, concedes: "[T]he court's task of elaborating the statutory 'intent' calls for imaginative scholarship and a certain amount of fiction." Levin, *supra* note 146, at 41.

237. The difficulty of deciding whether the legislature has delegated application responsibility is evident from Levin's discussion.

The apparent presence or absence of administrative expertise and the importance of the substantive issue are only two of the many guideposts a court can follow in deciding whether and how far a given issue has been delegated to agency resolution. It can adhere to traditional maxims that one might find in the standard treatises on statutory construction. It can follow any number of policies, presumptions, and 'clear statement

issue as one of law to which an already familiar weak deference methodology applies. Under that approach, there is no need to embark on the perilous and highly unfamiliar journey of deciding whether or not the legislature intended an implicit delegation, and no on-off decision is required.²³⁸

Of course, there are situations in which it is demonstrable in statutory text or legislative history that the legislature *did* intend to delegate to the agency the power to apply the law. One good example would be the application of such terms as "in the public interest" or "just and reasonable rates." Clearly, these phrases are so lacking in content that the legislature *must* have intended that agencies have primary responsibility for applying them to the facts.²³⁹ Certainly, there is strong historical usage to this effect. Where the legislature demonstrably delegated application of a legal standard to an agency, of course, the court would lack power to overturn a reasonable agency application.²⁴⁰

2. The Case-by-Case Policy Approach

Some courts have tried to solve the problem by making a case-by-case policy determination of whether a particular application question ought to

principles' articulated in the contemporary administrative law literature. And it can resort to the literature pertaining to the particular substantive area under scrutiny How much influence each of these sources of direction will carry is a matter on which judges naturally will differ—partly because judges are sometimes result-oriented, but more importantly because the guidelines themselves are only weak indicators of legislative intent.

Id. at 46.

238. Obviously, the weak deference approach is also vulnerable to the objection that it is indeterminate. Weak deference methodology requires the court to balance a number of factors in deciding whether deference is due and, if so, how much. In this respect, it is like all the scope of review formulas, including the substantial evidence and abuse of discretion standards. My claim is that the weak deference approach is much more familiar to California courts than the implicit delegation approach. Moreover, weak deference avoids saddling a court with responsibility to decide whether the legislature intended an implicit delegation to apply the law and thus avoids an on-off switch.

239. *NLRB v. Marcus Trucking Co.*, 286 F.2d 583, 591 n.5 (2d Cir. 1961). Another way to express the same idea is that decisions applying these terms are simply exercises of agency discretion. As discussed in Part IV, decisions involving discretion action are reviewed only for rationality.

240. Courts applying the weak deference approach and courts applying the delegation approach will often come out with similar results. Even where there is no demonstrable delegation, the factors that counsel deference (such as an agency's superior competence to perform a specific application) would also suggest that the legislature probably meant to delegate the application decision. However, the weak deference approach is easier to explain and to apply than an approach which begins by trying to identify the presence of an implicit delegation to apply the law.

be treated as a question of law or fact, based on a variety of factors such as judicial economy, comparative institutional advantage, and constitutional concerns.²⁴¹ While this approach seems to ask some of the right questions, I think it is too indeterminate and too difficult for trial courts to apply. It seems to omit some of the weak deference factors which are relevant, such as consistency and care. It is another on-off switch that will consume substantial judicial resources, since each new application issue (and there is an almost infinite number of them) will be uncertain. I continue to believe that it will be simpler to treat such questions as questions of law, leaving the intensity of review to vary with the specific context.

3. Treating Application Decisions as Questions of Fact

One last approach to the problem should be considered: classify all application questions as issues of fact.²⁴² Then the same substantial evidence (or independent judgment) standard applied to basic fact findings would apply to applications of those findings to the legal standard. Thus a court would have to affirm a reasonable agency application (under substantial evidence) or to substitute its judgment (under independent judgment).

I oppose this approach. First, it requires a court to perform the difficult line-drawing exercise that plagues existing law: It is not easy to distinguish application questions from pure questions of law, but that distinction would become critical if application questions (but not general law questions) were questions of fact.

Secondly, assuming the substantial evidence test applies, this approach is not a defensible allocation of responsibility between agencies and courts, for it would strip courts of responsibility for applying the law in every case. It would always allocate to agencies rather than courts the power to apply common law or constitutional law to the facts, even though the agency might lack any relevant expertise. It would require courts to ignore important public policy reasons for judicial rather than agency responsibility for applying law to fact.

If the independent judgment test applies, this approach would require courts to substitute judgment in all cases of applications, apparently without using weak deference methodology. That would sacrifice the benefits of

241. See *Campbell v. Merit Sys. Protection Bd.*, 27 F.3d 1560, 1563-67 (Fed. Cir. 1994), which struggles for pages over whether an agency decision that a candidate is or is not "independent" should be reviewed as a question of law or fact.

242. 2 JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 228 (1898) (whether particular facts add up to negligence is a decision of fact).

weak deference—the ability to take account of agency specialization and expertise in appropriate cases. Treating application questions as matters of fact is, in practice, a formula of rigidity; whereas treating them as questions of law is a formula for flexibility in light of the weak deference methodology.

IV. JUDICIAL REVIEW OF AGENCY'S EXERCISE OF DISCRETION

A. Introduction

An agency has *discretion* when the law allows it to choose between several alternative policies or other courses of action. Discretion permeates every governmental function and is indispensable to well-functioning government. The term covers both micro-judgments as to specific parties and macro-judgments such as setting policy to achieve collective goals.

To cite a few examples of discretionary micro-judgments, an agency has the power to choose a severe or a lenient penalty,²⁴³ decide whether there is "good cause" to deny a license,²⁴⁴ ascertain whether to grant permission for various sorts of land uses,²⁴⁵ or approve a corporate reorganization as fair.²⁴⁶ As examples of macro-judgment or policymaking discretion, an agency might have power to prescribe the permitted level of a toxin in drinking water or to decide whether to favor the environment at the expense of economic development or development at the expense of the environment. Discretion also exists in functions other than rulemaking or adjudication such as deciding with whom to make a contract and on what terms,²⁴⁷ in deciding what environmental problems should be canvassed in preparing an environmental impact statement, or in deciding whom to investigate or to charge when available resources are limited.

How courts should review agency discretionary decisions is an unsolved puzzle. How intensely should a court examine the factual underpinnings for a discretionary or policy judgment? How far should a court go

243. See *supra* text accompanying note 76.

244. *Martin v. Alcoholic Beverage Control Appeals Bd.*, 55 Cal. 2d 867, 13 Cal. Rptr. 513 (1961).

245. See, e.g., *Dore v. County of Ventura*, 23 Cal. App. 4th 320, 28 Cal. Rptr. 2d 299 (1994).

246. *Bixby v. Pierno*, 4 Cal. 3d 130, 150, 93 Cal. Rptr. 234, 248 (1971).

247. See *Joint Council of Interns & Residents v. Board of Supervisors*, 210 Cal. App. 3d 1202, 258 Cal. Rptr. 762 (1989) (decision to contract out services); *Hubbs v. California Dep't of Pub. Works*, 36 Cal. App. 3d 1005, 112 Cal. Rptr. 172 (1974) (terms on which houses will be leased).

in second-guessing the wisdom of the judgment? Can a court require an agency to explain its decision? What sort of review process is appropriate—a new trial or review exclusively on the agency record or something in between? Unfortunately, California law is replete with conflicting doctrines relating to these important issues.

B. Present California Law

1. Reviewability of Discretionary Action

California courts have power to review agency discretionary decisions on the grounds of legality, procedural irregularity, or abuse of discretion despite broad statutory delegations of discretionary authority.²⁴⁸ Unlike federal law,²⁴⁹ California law has not marked out a subset of decisions that are unreviewable because they are committed to agency discretion.²⁵⁰

248. See *Saleeby v. State Bar*, 39 Cal. 3d 547, 563, 216 Cal. Rptr. 367, 376 (1985) (Bar's discretion choosing which persons should be reimbursed under client security fund is reviewable); *Paulsen v. Golden Gate Univ.*, 25 Cal. 3d 803, 808-09, 159 Cal. Rptr. 858, 860-61 (1979) (decision denying degree to flunked-out student reviewable); *Shuffer v. Board of Trustees*, 67 Cal. App. 3d 208, 220, 136 Cal. Rptr. 527, 534 (1977) (academic dispute between student and college reviewable); *Manjares v. Newton*, 64 Cal. 2d 365, 370, 49 Cal. Rptr. 805, 809 (1966) (school board's discretionary decision refusing to provide transportation reviewable). A prosecutor's discretion is not controllable in an action brought by a third party but is subject to review in the normal course of criminal litigation. *Dix v. Superior Court*, 53 Cal. 3d 442, 451, 279 Cal. Rptr. 834, 837 (1991).

249. Agency action is unreviewable when "committed to agency discretion by law." Administrative Procedure Act § 10, 5 U.S.C. § 701(a)(2) (1988).

250. One line of California cases resembles the federal doctrine of commitment to agency discretion. See *Sklar v. Franchise Tax Bd.*, 185 Cal. App. 3d 616, 230 Cal. Rptr. 42 (1986) (whether to disallow cost of alcoholic beverages as business expenses); *Women Organized for Employment v. Stein*, 114 Cal. App. 3d 133, 170 Cal. Rptr. 176 (1980) (what data Insurance Commissioner should collect). In these cases, public interest plaintiffs, asserting standing as taxpayers, sought to use mandamus to reorder agency priorities. See generally Robert M. Myers, *Standing in Public Interest Litigation: Removing the Procedural Barriers*, 15 LOY. L.A. L. REV. 1 (1981) (taxpayers have virtually unlimited standing to sue in California). The courts denied the requested relief, ruling that mandamus cannot compel discretion to be exercised in some particular manner, absent a ministerial duty or an abuse of discretion. So these cases can be read as substantive holdings that the agency did not abuse discretion or as holdings concerning the inappropriateness of the requested remedy. At bottom, they reflect a sound judgment that the judiciary should not take over management of an agency without a manifestation of legislative intent to limit the agency's discretion.

2. Record for Review and Reasons Requirement

Several important procedural questions arise frequently in connection with judicial review of discretionary action and are linked to the problem of scope of review. The first issue is whether additional evidence can be introduced at the judicial review stage (an "open record") or whether the decision must be exclusively on the record made at the agency level (a "closed record"). The second issue is whether the agency is required to give reasons for discretionary action.

a. Closed or Open Record

Normally, when a court reviews an agency adjudicatory decision resulting from a formal hearing, the reviewing court receives no additional evidence.²⁵¹ In the case of review of regulations, the California statute seems to establish a closed record.²⁵² Similarly, review under traditional mandamus of agency rulemaking is conducted on a closed record.²⁵³ However, the Supreme Court has indicated in dictum that agency review under traditional mandamus of ministerial or informal agency actions is conducted on an open record.²⁵⁴ Earlier California cases also call for

251. In substantial evidence cases, the superior court receives no additional evidence. If there is evidence that with reasonable diligence could not have been produced, or that was improperly excluded by the agency, the court can remand to the agency to reconsider the case in light of that evidence. CAL. CIV. PROC. CODE §§ 1094.5(e), (f) (West 1980 & Supp. 1995). In independent judgment cases, a court can remand to the agency for reconsideration of such evidence or admit the evidence itself. CAL. CIV. PROC. CODE § 1094.5(e) (West 1980 & Supp. 1995). Presumably, if independent judgment is abolished, as suggested in Part I, this provision for a partially open record would fall along with it.

252. "For purposes of this section, the record shall be deemed to consist of all material maintained in the file of the rulemaking proceeding as defined in Section 11347.3." CAL. GOV'T CODE § 11350(b)(2) (West 1992 & Supp. 1995); see also *Ford Dealers Ass'n v. DMV*, 32 Cal. 3d 347, 365 n.11, 185 Cal. Rptr. 453, 464 n.11 (1982).

253. *Western States Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559, 573, 38 Cal. Rptr. 2d 139, 146 (1995). This decision establishes a closed record principle for quasi-legislative agency action. It disapproved an earlier decision that called for an open record in cases of local environmental rulemaking. *No Oil, Inc. v. City of L.A.*, 13 Cal. 3d 68, 79 n.6, 118 Cal. Rptr. 34, 41 n.6 (1974). *Western States* holds that the same closed record principle applies to both environmental and non-environmental rulemaking.

For earlier decisions consistent with *Western States*, see *Shapell Indus., Inc. v. Governing Bd.*, 1 Cal. App. 4th 218, 233-34, 1 Cal. Rptr. 2d 818, 825-26 (1991) (inadmissibility of expert's report); *Guidotti v. County of Yolo*, 214 Cal. App. 3d 1552, 1561, 271 Cal. Rptr. 858, 863 (1989) (court limited to facts before the Board); *Brock v. Superior Court*, 109 Cal. App. 2d 594, 607-09, 241 P.2d 283, 291-93 (1952) (improper to remand to agency to take additional evidence).

254. *Western States*, 9 Cal. 4th at 547-48, 38 Cal. Rptr. 2d at 149-50.

an open record in such cases.²⁵⁵ This is understandable, given that the record of informal agency action often is poorly organized; it may be a couple of files, a memo, or a cardboard box into which various documents have been tossed. However, the federal rule is to the contrary: Even informal agency action is reviewed on a closed record.²⁵⁶

b. Giving Reasons

Another recurring issue is whether an agency should be required to explain discretionary actions subject to judicial review. Present law requires a statement of reasons in the case of state or local adjudicatory action reviewed under Section 1094.5²⁵⁷ or under traditional mandamus,²⁵⁸ but does not require an explanation in the case of quasi-legislative action,²⁵⁹ unless one is required by statute.²⁶⁰ Under federal law, the courts have come increasingly to require an adequate and contemporaneous explanatory statement for discretionary agency action subject to judicial review.²⁶¹

255. *Manjares v. Newton*, 64 Cal. 2d 365, 49 Cal. Rptr. 805 (1966) (school board's decision refusing to supply transportation to children in remote area); *California Correctional Peace Officers Ass'n v. State Personnel Bd.*, 217 Cal. App. 4th 623, 636, 32 Cal. Rptr. 2d 93, 101 (1994) (judicial review of personnel decision); *Bright Dev. Co. v. City of Tracy*, 20 Cal. App. 4th 783, 795-96, 24 Cal. Rptr. 2d 618, 624-26 (1993) (city's decision to underground utilities); *C. v. Superior Court*, 29 Cal. App. 3d 909, 919-20, 106 Cal. Rptr. 123, 130-31 (1973) (whether child should be taken from adoptive parents).

256. *Camp v. Pitts*, 411 U.S. 138, 142 (1973). However, the federal rule has been riddled by numerous exceptions. See Steven Stark & Sarah Wald, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, 36 ADMIN. L. REV. 333 (1984); Susannah T. French, Comment, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 CAL. L. REV. 929 (1993).

257. *Topanga Ass'n for a Scenic Community v. County of L.A.*, 11 Cal. 3d 506, 113 Cal. Rptr. 836 (1974). *Topanga* required a local agency to explain how it got from raw facts to its ultimate decision granting a zoning variance. However, courts have not required agencies to explain why they chose one penalty rather than another. *Williamson v. Board of Medical Quality Assurance*, 217 Cal. App. 3d 1343, 266 Cal. Rptr. 520 (1990).

258. *Saleeby v. State Bar*, 39 Cal. 3d 547, 566-68, 216 Cal. Rptr. 367, 378-80 (1985).

259. *California Aviation Council v. City of Ceres*, 9 Cal. App. 4th 1384, 12 Cal. Rptr. 2d 163 (1992) (action adjudicatory not legislative so findings required); *City of Santa Cruz v. Local Agency Formation Comm'n*, 76 Cal. App. 3d 381, 386-91, 142 Cal. Rptr. 873, 875-77 (1978) (decisions of Commission are quasi-legislative so no findings required). Of course, rulemaking by state agencies is subject to elaborate explanation requirements. CAL. GOV'T CODE § 11346 *et seq.* (West 1992).

260. *California Hotel & Motel Ass'n v. Industrial Welfare Comm'n*, 25 Cal. 3d 200, 216, 157 Cal. Rptr. 840, 850 (1979) (order lacked statement of basis required by statute).

261. See Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 413-25.

3. Legal Questions Embedded in Exercise of Discretion

Agency discretion is always constrained at the margin by statutes and constitutional provisions.²⁶² In reviewing discretionary action, a court first decides whether the agency's choice was legally permissible, using the normal weak deference methodology,²⁶³ and whether the agency followed legally required procedures.²⁶⁴

In exercising discretion, an agency generally must consider and balance various factors established by statute, constitution, or common law. A reviewing court decides independently whether the agency considered all of the legally relevant factors and whether it considered factors that it should not have considered.²⁶⁵

4. Abuse of Discretion

Within the legal limits constraining an agency's discretion, the agency has power to choose between alternatives. A court must not substitute its judgment for the agency's, since the legislature delegated discretionary power to the agency, not to the court. Nevertheless, a court should reverse

262. See *California Ass'n of Psychology Providers v. Rank*, 51 Cal. 3d 1, 11, 270 Cal. Rptr. 796, 800-01 (1990) (regulation limiting practice of psychologists inconsistent with governing statute).

263. See *supra* Part II.

264. See, e.g., *California Hotel*, 25 Cal. 3d at 209-16, 157 Cal. Rptr. at 845-50 (order lacked statement of basis required by statute); *Apte v. Regents of Univ. of Cal.*, 198 Cal. App. 3d 1084, 1098-99, 244 Cal. Rptr. 312, 319-20 (1988) (failure to consider relevant evidence). The reviewing court's power to decide whether appropriate procedures were followed is discussed *infra* in Part V.

265. *Sierra Club v. State Bd. of Forestry*, 7 Cal. 4th 1215, 1235-36, 32 Cal. Rptr. 2d 19, 32 (1994) (failure to consider required information made approval of timber harvest plan abuse of discretion); *Clean Air Constituency v. California Air Resources Bd.*, 11 Cal. 3d 801, 813-16, 114 Cal. Rptr. 577, 584-86 (1974) (energy crisis not permissible reason to delay implementation of emission controls); *Guidotti v. County of Yolo*, 214 Cal. App. 3d 1552, 1561, 271 Cal. Rptr. 858, 863 (1989) (court considers whether agency considered all relevant factors and demonstrated rational connection between those factors, the choice it made, and the purpose or the enabling statute); *Levin*, *supra* note 34, at 250-53 (decision of whether appropriate factors were considered is question of law).

For example, in deciding whether there is good cause to discharge a government employee, the courts have established that the ground for discharge must relate to the person's fitness for the job. *Morrison v. State Bd. of Educ.*, 1 Cal. 3d 214, 82 Cal. Rptr. 175 (1969). The relevant factors the agency must consider are whether the misconduct caused harm to the public, the circumstances surrounding the misconduct, and the likelihood of recurrence. *Skelly v. State Personnel Bd.*, 15 Cal. 3d 194, 217-18, 124 Cal. Rptr. 14, 30-31 (1975).

if an agency's choice was an abuse of discretion.²⁶⁶ Review for abuse of discretion consists of two distinct inquiries: the adequacy of the factual underpinning of the discretionary decision and the rationality of the choice.²⁶⁷

a. Factual Basis for Discretion

A discretionary decision always depends on factual assumptions; thus a reviewing court must ascertain whether the decision was factually supported.²⁶⁸ In administrative mandamus cases under Section 1094.5, the factual basis for a discretionary act is reviewed under either the substantial evidence or independent judgment tests.²⁶⁹ In all other cases, the factual basis of the agency's decision is scrutinized as part of the process of review for abuse of discretion.

It remains unclear whether the substantial evidence test calls for more exacting scrutiny of the factual underpinnings of discretionary action than does the abuse of discretion test. The prevailing view is that the standards have converged:²⁷⁰ Under either approach the court should ask whether a

266. The conventional phrase is "arbitrary, capricious, [or] an abuse of discretion." Administrative Procedure Act § 10(e), 5 U.S.C. § 706(2)(A) (1988). Since all three terms seem to mean the same thing, I will follow California practice by referring to the standard as "abuse of discretion."

267. Donald W. Brodie & Hans A. Linde, *State Court Review of Administrative Action: Prescribing the Scope of Review*, 1977 ARIZ. ST. L.J. 537, 553-56; see, e.g., *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 788-96 (1990) (finding Board's policy rational both because it was empirically supported and because it was grounded in legitimate policy concerns).

268. See *20th Century Ins. Co. v. Garamendi*, 8 Cal. 4th 216, 278, 32 Cal. Rptr. 2d 807, 846 (1994) (ratemaking regulations depend on a variety of legislative facts); *Moore v. California State Bd. of Accountancy*, 2 Cal. 4th 999, 1015-16, 9 Cal. Rptr. 2d 358, 367-68 (1992), cert. denied, 113 S. Ct. 1364 (1993) (opinion poll forms factual basis for Board's regulation).

269. See *supra* Part I. CAL. CIV. PROC. CODE § 1094.5(b) (West 1980 & Supp. 1995) explicitly provides that a lack of factual support for a finding, under either substantial evidence or independent judgment, is an abuse of discretion.

An appellate court's review of a trial court's decision concerning agency abuse of discretion does not vary depending on whether the trial court used substantial evidence or independent judgment. The appellate court inquires whether the agency's decision was an abuse of discretion, not whether the trial court's decision was a reasonable one. See *Osburn v. Department of Transp.*, 221 Cal. App. 3d 1339, 270 Cal. Rptr. 761 (1990) (trial court used substantial evidence); *Cadilla v. Board of Medical Examiners*, 26 Cal. App. 3d 961, 103 Cal. Rptr. 455 (1972) (trial court used independent judgment).

270. Under federal law, it is probable that the two standards are synonymous, yet the issue remains unresolved. See *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 618-26 (1966) (substantial evidence test in reviewing discretionary action); 2 DAVIS & PIERCE, *supra* note 22, § 11.4 (Supreme Court cases draw distinction, yet practical effect of the two tests is similar); Levin, *supra* note 134, at 271-72 (difficult to perceive why any distinction should be preserved); Matthew J. McGrath, Comment, *Convergence of the Substantial Evidence and Arbitrary and Capri-*

reasonable person could reach the same factual conclusions as did the agency. For example, in *Guidotti v. County of Yolo*,²⁷¹ the court reviewed a county's discretionary decision setting the level of general relief. By law, the county must provide general relief at a level that permits a recipient to meet basic needs for food and shelter. The court scrutinized the agency's study of housing costs to see whether it provided a reasonable basis for the decision. This level of scrutiny was precisely that called for by the substantial evidence test.

The convergence theory is also supported by a statute relating to judicial review of regulations adopted by state agencies. When the legislature revised the rulemaking provisions of the APA in 1979, it recodified earlier statutes on the scope of judicial review.²⁷² However, in 1982, the section was amended to provide: "In addition to any other ground that may exist, a regulation may be declared invalid if . . . the agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute . . . that is being implemented . . . is not supported by substantial evidence."²⁷³

The legislative history of the 1982 amendment makes clear that the legislature intended a significant intensification of review of the factual support for a regulation.²⁷⁴ This legislative action might be considered as

cious Standards of Review during Informal Rulemaking, 54 GEO. WASH. L. REV. 541 (1986).

271. 214 Cal. App. 3d 1552, 1561-63, 271 Cal. Rptr. 858, 863-64 (1989). Other cases using a substantial evidence standard to review the factual basis for discretionary action include: *California Hotel & Motel Ass'n v. Industrial Welfare Comm'n*, 25 Cal. 3d 200, 213, 157 Cal. Rptr. 840, 848 (1979); *City of Santa Cruz v. Local Agency Formation Comm'n*, 76 Cal. App. 3d 381, 393, 142 Cal. Rptr. 873, 880 (1978); *Bixby v. Pierno*, 4 Cal. 3d 130, 148-51, Cal. Rptr. 234, 247-49 (1971).

272. Prior to the 1982 amendment, section 11350(b) of the California Government Code provided that "a regulation may be declared invalid if . . . the court cannot find that the record of the rulemaking proceeding supports the agency's determination that the regulation is reasonably necessary". CAL. GOV'T CODE § 11350(b) (1979) (modified 1982).

273. CAL. GOV'T CODE § 11350(b)(1) (West 1992 & Supp. 1995).

274. The purpose of the new section was summarized in a letter from Assemblyman Leo McCarthy to Speaker Willie Brown. McCarthy wrote:

The principal addition AB 2820 makes to what we approved in AB 1111 in 1979 is a specific level of evidence that an agency must meet to demonstrate the need for a particular regulation. The standard is substantial evidence taking the record as a whole into account.

That standard is a familiar one in the law and has been given a definite interpretation by the courts in the past. Our intent is that an agency must include in the record facts, studies or testimony that are specific, relevant, reasonable, credible, and of solid value, that, together with those inferences that can rationally be drawn from such facts, studies, or testimony, would lead a reasonable mind to accept as sufficient support for the conclusion that the particular regulation is necessary. Suspicion, surmises, speculation, feelings, or incredible evidence is not substantial

a signal that the substantial evidence test is appropriate in all cases in which the issue is the factual basis for agency discretionary action. Similarly, in environmental cases, the legislature equated abuse of discretion with substantial evidence.²⁷⁵

Some California authority suggests that the two standards differ. Thus a number of cases indicate that a court should not reverse quasi-legislative agency action unless evidentiary support for the action is "entirely lacking."²⁷⁶ This approach is reminiscent of early federal cases that accorded discretionary agency judgments the same extreme deference that is given to statutes challenged under substantive due process.²⁷⁷

5. Reasonableness of the Agency's Discretionary Choice

Finally, the question remains: Is the agency's choice acceptable or an abuse of discretion? The prevailing view is that the court should test the discretionary decision for rationality. Based upon legislative policies underlying the delegation, the factual predicates in the record, and the agency's explanation, does the agency's choice seem rational? Does it make sense? Can you get there from here?²⁷⁸ In contrast, some California cases sug-

The proposed standard requires the assessment to determine necessity to be made taking into account the totality of the record. That means the standard is not satisfied simply by isolating those facts that support the conclusion of the agency

LEGISLATURE OF CALIFORNIA, ASSEMBLY DAILY JOURNAL, 208th Sess. 13,633-34 (1982).

275. The California Environmental Quality Act ("CEQA") provides that the substantial evidence test applies to judicial review of both quasi-legislative and adjudicatory decisions of public authorities. CAL. PUB. RES. CODE §§ 21168, 21168.5 (West 1986); see also *Laurel Heights Improvement Ass'n v. Regents of the Univ. of Cal.*, 47 Cal. 3d 376, 408, 253 Cal. Rptr. 426, 441-42 (1988) (in environmental case court must examine evidence on both sides in applying substantial evidence test).

276. *Western States Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559, 574-75, 38 Cal. Rptr. 2d 139, 147 (1995) (dictum). *Western States* quotes *Fullerton Joint Union High Sch. Dist. v. State Bd. of Educ.*, 32 Cal. 3d 779, 786, 794, 187 Cal. Rptr. 398, 402, 407-08 (1982), *disapproved on other grounds*, *Board of Supervisors of Sacramento County v. Local Agency Formation Comm'n*, 3 Cal. 4th 903, 13 Cal. Rptr. 2d 245 (1992). See also *Pitts v. Perluss*, 58 Cal. 2d 824, 833, 27 Cal. Rptr. 19, 24 (1962) (review of a regulation before the adoption of § 11350(b)). Present California Government Code section 11350(b) overturns the rule in *Pitts*, insofar as it applies to regulations adopted by state agencies, but *Pitts* might remain authoritative for review of quasi-legislative action other than rulemaking or for rules adopted by local agencies.

277. See, e.g., *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 182 (1935). This approach is followed in many states which eschew rationality review of the discretionary element of agency rules. See William Funk, *Rationality Review of State Administrative Rulemaking*, 43 ADMIN. L. REV. 147, 160-79 (1991).

278. For examples of this test at work, see *California Hotel & Motel Ass'n v. Industrial Welfare Comm'n*, 25 Cal. 3d 200, 212, 157 Cal. Rptr. 840, 847 (1979) ("A court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.");

gest that review for abuse of discretion is extremely deferential, apparently less intrusive than review for rationality.²⁷⁹

One important factor in establishing an abuse of discretion is an apparent inconsistency of the agency decision with its prior decisions.²⁸⁰ If an agency makes a choice that differs from its prior decisions, without adequately accounting for the difference, a court is likely to find the discretion has been abused.²⁸¹ Of course, agencies are free to (and encouraged to) rethink their policies and update them; all that is required is an explanation for the change in course.²⁸²

Manjares v. Newton, 64 Cal. 2d 365, 370, 49 Cal. Rptr. 805, 809 (1966) (school board's decision not to supply transportation to children in remote area was unreasonable); *Department of Parks & Recreation v. State Personnel Bd.*, 233 Cal. App. 3d 813, 830-34, 284 Cal. Rptr. 839, 848-51 (1991) (if reasonable minds may differ as to propriety of penalty, agency acted within area of its discretion—"difficult decisions are what discretion is all about").

279.

The rendition of this regulation [concerning disability insurance] involved 'highly technical matters requiring the assistance of skilled and trained experts and economists and the gathering and study of large amounts of statistical data and information.' Under such circumstances, 'courts should let administrative boards and officers work out their problems with as little judicial interference as possible.'

Pitts v. Perluss, 58 Cal. 2d 824, 835, 27 Cal. Rptr. 19, 26 (1962) (citations omitted); see also *California Ass'n of Professional Employees v. County of L.A.*, 74 Cal. App. 3d 38, 43, 141 Cal. Rptr. 290, 292 (1977) (court will not interfere with County's chosen method for reimbursing employees for travel expenses); *Tahoe-Sierra Preservation Council v. State Water Resources Control Bd.*, 210 Cal. App. 3d 1421, 1439, 259 Cal. Rptr. 132, 144 (1989) (rule subject to same test of validity as act of legislature).

The often-quoted language in *Pitts v. Perluss* supported the uncontroversial proposition that the court should not substitute its judgment for that of the agency. *Pitts*, 58 Cal. 2d at 832, 834-35, 27 Cal. Rptr. at 24-26. Therefore, it is unclear whether the Court meant to deny that it had power to overturn a regulation that seemed to make an unreasonable choice. In fact, the Court carefully evaluated all of the insurer's arguments before rejecting them.

280. This proposition is well established in federal administrative law. "[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored. . . ." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1971), cert. denied, 403 U.S. 923 (1971); see also 2 DAVIS & PIERCE, *supra* note 22, § 11.5; Levin, *supra* note 134, at 257.

281. See *Paulsen v. Golden Gate Univ.*, 25 Cal. 3d 803, 809, 159 Cal. Rptr. 858, 861 (1979) (inconsistent treatment may show abuse of discretion if it was result of arbitrary or bad faith decision, but not shown in this case); *Court House Plaza Co. v. City of Palo Alto*, 117 Cal. App. 3d 871, 881-82, 173 Cal. Rptr. 161, 164-65 (1981) (reviewing claim of inconsistent treatment under constitutional standards).

282. See MODEL STATE ADMINISTRATIVE PROCEDURE ACT OF 1981 § 5-116(c)(8)(iii), 15 U.L.A. 7, 127 (1990) (court shall grant relief if agency action, other than a rule, is inconsistent with the agency's prior practice unless the agency justifies the inconsistency by stating facts and reasons to demonstrate a fair and rational basis for the inconsistency).

6. Hard Look

One of the most important developments in federal administrative law is the "hard look" doctrine that evolved during the 1970s and 1980s.²⁸³ A court employing hard look methodology scrutinizes agency policymaking in a relatively non-deferential manner, particularly in the presence of certain danger signals such as patent political motivation or an abrupt change in course. Hard look review was launched by the famous *Overton Park*²⁸⁴ decision in 1971 and reached its zenith in the *Airbags* case,²⁸⁵ decided by the Supreme Court in 1983. It continues to wax and wane depending on the inclinations of particular judges and justices.

Federal "hard look" review consists of two strands: first, the court assures itself that the agency has taken a hard look at the problem; second, the court itself takes a hard look at the agency's choice. Under the first strand, the court requires a detailed explanation of the agency decision, demands justification for departures from past practices, and ascertains whether the agency considered all reasonable alternatives to its action (including those proposed by outsiders). Under the second strand, the court itself critically examines the relevant evidence in order to decide whether the agency's choice is factually supportable, faithful to the legislative purpose, and within the zone of reasonableness. So far, California courts have shown little inclination to emulate either strand of federal hard look review. Their review of agency discretionary choices has been relatively deferential.

C. Recommendations

While California law relating to abuse of discretion is confusing and contradictory, the mainstream rules make sense. Courts need to sweep away the underbrush and simplify the law, and the legislature should codify the principles in a new judicial review statute.

283. See generally Breyer, *supra* note 143, at 382-97; Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 525-62 (1985).

284. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971). The Court stated that judicial review should be "thorough, probing, in-depth" and it should be "searching and careful, [but] the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Id.* (citations omitted).

285. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983); see also Breyer, *supra* note 143, at 384-88 (discussing strictness of review in the *Airbags* case).

1. Unreviewability

A new judicial review statute probably should not contain a specific provision concerning non-reviewability of discretionary decisions.²⁸⁶ The provision in the federal APA precluding judicial review of action committed to agency discretion has proved difficult to apply.²⁸⁷ Present California law presumes reviewability of discretionary action and includes a healthy strain of judicial reluctance to improperly second guess agency priorities.²⁸⁸ This law seems to be working well and there is little to be gained from adopting a vague discretionary preclusion provision which would require years of judicial explication.

2. Record for Review and Reasons Requirement

a. Closed Record

What should the record contain on judicial review of discretionary agency action? At a minimum, the record should include all procedural documents such as public notices, submissions to the agency by outsiders, transcripts of hearings and similar materials. It should also include all data that agency decisionmakers (both agency heads and agency staff members) considered when they took the action in question,²⁸⁹ whether or not

286. Obviously, if the legislature explicitly precludes review of a specific agency function, the court is bound to respect that judgment absent constitutional constraints. The issue of the constitutionality of review preclusion is beyond the scope of this Article. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 3-5 (2d ed. 1988).

287. Federal law precludes review of action "committed to agency discretion by law." Administrative Procedure Act § 10, 5 U.S.C. § 701(a)(2) (1988). This means that action is unreviewable if there is "no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). In fact, the phrase conceals an uneasy mixture of other policies, such as the unreviewability of prosecutorial discretion, the inappropriateness of judicial involvement in intelligence decisions or agency budgetary priorities, and the desirability of reviewing at least constitutional claims. See, e.g., *Lincoln v. Vigil*, 113 S. Ct. 2024, 2031 (1993) (agency decision to terminate program funded by lump-sum appropriation); *Webster v. Doe*, 486 U.S. 592, 603-04 (1988) (CIA employment decision); *Heckler v. Chaney*, 470 U.S. 821 (1985) (refusal to exercise enforcement discretion). See generally 3 DAVIS & PIERCE, *supra* note 22, §§ 17.6-17.9; Andersen, *supra* note 122, at 536 (advising against generic exceptions to judicial review for discretionary actions in state law).

288. See *supra* text accompanying note 274.

289. The record need not include documents relating to the internal decisionmaking process of the agency or other privileged materials. For example, memoranda from advisers to decisionmakers that would normally be privileged need not be included in the record unless the agency chooses to include them. See *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325, 283 Cal. Rptr. 893 (1991) (recognizing deliberative process privilege from disclosure under Public Records Act); *Roberts v. City of Palmdale*, 5 Cal. 4th 363, 20 Cal. Rptr. 2d 330 (1993) (recognizing attor-

submitted to the agency by outsiders, and whether it supports or undercuts the agency's decision.²⁹⁰ Government Code section 11347.3 defines the rulemaking file;²⁹¹ it can serve as a useful model.²⁹² The question is whether that record should be exclusive.

The 1981 Model Act opts for an open record approach in cases other than the review of formal adjudicatory action.²⁹³ The Model Act's rationale is efficiency based. A closed record would, in effect, require an agency to build a file to support every detail of every action. Such record building is expensive and would involve unnecessary busywork if the action is never challenged in court. A closed record approach also imposes a significant burden on outsiders to muster every possible bit of evidence in support of their position and get it before agency decisionmakers prior to the agency decision (if there is even any opportunity for them to do so). Moreover, if the agency has failed to assemble such a record while considering the issue, it may be costly or even impossible to pull it together later at the judicial review stage. And the record ultimately assembled by the agency may omit

ney-client privilege under Public Records Act).

290. Agency counsel in assembling the record may omit material harmful to the agency's case. Federal cases allow challengers, upon making a prima facie case that the agency excluded adverse materials from the record, to engage in discovery to assist the court in supervising the compilation of the record. See *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993); Levin, *supra* note 134, at 275-77. Upon a proper preliminary showing, courts should probably have discretion to permit such discovery—not to probe the minds of the agency decisionmakers but to assure that the record presented to the court is complete.

291. This section prescribes the record for purposes of both judicial review and review by the Office of Administrative Law ("OAL"). The California rulemaking process requires that all rules be approved by OAL on the basis of such criteria as clarity, authority, and reasonable necessity. CAL. GOV'T CODE §§ 11349-11349.11 (West 1992). See generally Asimow, *supra* note 160.

292. In addition to the obvious items, California Government Code section 11347.3 includes in the rulemaking file: "(7) All data and other factual information, technical, theoretical, and empirical studies or reports, if any, on which the agency is relying in the adoption, amendment, or repeal of a regulation" CAL. GOV'T CODE § 11347.3(a)(7) (West 1992 & Supp. 1995). It also calls for the agency to prepare an index or table of contents which identifies each item contained in the rulemaking file. *Id.* § 11347.3(a)(12) (West 1992 & Supp. 1995). Probably agencies should be obligated to prepare such an index in all cases, since agency records of non-adjudicatory action tend to be quite disorganized. Cf. *State Bd. of Equalization v. Superior Court*, 10 Cal. App. 4th 1177, 1190-93, 13 Cal. Rptr. 2d 342, 350-51 (1992) (court can order agency to make index of documents requested under Public Records Act).

293. MODEL STATE ADMINISTRATIVE PROCEDURE ACT OF 1981 § 5-114(a)(3), 15 U.L.A. 7, 124 (1990); see also ARTHUR BONFIELD, STATE ADMINISTRATIVE RULEMAKING 351-62 (1986). Although the agency can introduce new factual support for its conclusions, it is not free to advance new reasons for its actions. MODEL STATE ADMINISTRATIVE PROCEDURE ACT OF 1981 § 3-110(b), 15 U.L.A. 7, 46. For a survey of the law of the states on the openness of the record, see Andersen, *supra* note 122, at 543-45.

materials that undercut the decision, but this would be difficult for outsiders to detect.²⁹⁴

However on the other side, the Model Act's open record approach has some negative efficiency consequences. It virtually insures long, costly trials at the judicial review stage in which either side is free to bring in new expert witnesses or economic analyses to buttress its position. In this era of controversial and technical agency decisions in the areas of land use, environmental control, and economic regulation, retrial of factual issues would impose a significant and unwelcome burden on an overburdened judiciary.

On a practical level, an open record approach encourages private litigants and agencies to engage in strategic behavior, often referred to as "sandbagging." A litigant might decide to hold back evidence at the time of the agency decisional phase so that it will be available at the judicial review phase. This could be a good strategy because evidence that would have been discredited by the agency could be more effective if presented for the first time to a court which is less qualified to pick out defects in that evidence.

An open record is also theoretically objectionable. The legislature assigned the discretionary decision to the agency; the court's function is to check it for rationality. When a trial court entertains new evidence, its fundamental role is subtly altered; the question is no longer the rationality of the agency's decision at the time it occurred. Instead, the issue becomes the rationality of the decision in light of the evidence presented at the trial. By taking and considering new evidence which it can choose to believe or disbelieve, the court supplants the agency's function and exercises independent judgment on the evidence instead of rationality review.²⁹⁵

Existing California law requires a closed record in cases of review of agency rulemaking or other quasi-legislative activity, but an open record in cases of judicial review under traditional mandamus of agency informal or ministerial action.²⁹⁶ For the above reasons, I believe that a closed record should be used in all cases of judicial review, whether the agency action in question is quasi-legislative, quasi-judicial, ministerial, or informal. Those reasons apply as much to adjudicative action as to legislative action. Retrial of factual issues before the court would be inefficient, would

294. Stark & Wald, *supra* note 256, at 342-43, 358-62. Because of this problem, outsiders should have limited discovery rights where there is suspicion that the agency has pruned the record. See *supra* note 290.

295. See *Western States Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559, 574-77, 38 Cal. Rptr. 2d 139, 147-48 (1995).

296. See *id.*, 38 Cal. Rptr. 2d at 147-48 (discussed *supra* note 272 and accompanying text). The language in *Western States* concerning informal or ministerial action is dictum.

encourage sandbagging, and would transfer authority from the agency (to whom a legislature delegated the function in question) to the court. In addition, the existing California distinction requires courts to distinguish quasi-legislative from quasi-adjudicatory action, a notoriously elusive distinction. Future court decisions or a new judicial review statute should endorse this view.

One appropriate exception to the closed record requirement applies to procedural objections that could not be resolved by reference to the record.²⁹⁷ Alternatively, however, the court could remand the case to the agency to find the necessary facts or to a specially appointed trier of fact. Probably, there should be an additional safety valve exception allowing courts to admit new evidence in exceptional circumstances.²⁹⁸ If a court needs additional evidence to ascertain whether the agency action was an abuse of discretion, the matter should be remanded to the agency to receive the evidence and reconsider the matter in light of the new evidence.²⁹⁹

297. See *id.*, 38 Cal. Rptr. 2d at 147-48 (dictum). Similarly, the 1981 Model State Administrative Procedure Act § 5-114(a)(1) and (2) allows new evidence regarding "improper constitution as a decision-making body, or improper motive or grounds for disqualification, of those taking the agency action; (2) unlawfulness of procedure or of decision-making process." MODEL STATE ADMINISTRATIVE PROCEDURE ACT OF 1981 § 5-114(a)(1), (2), 15 U.L.A. 7, 124. Since problems like *ex parte* contact, violation of separation of functions, or decisionmaker bias, are not apparent from the record, proof in court might be appropriate. Of course, such claims are difficult to establish since it is normally inappropriate to require agency decisionmakers or their staff to testify about their decisionmaking process, absent some well-founded basis for believing that a violation occurred. See *United States v. Morgan*, 313 U.S. 409 (1941); *City of Fairfield v. Superior Court*, 14 Cal. 3d 768, 122 Cal. Rptr. 543 (1975); *State of California v. Superior Court*, 12 Cal. 3d 237, 256-58, 115 Cal. Rptr. 497, 509-11 (1974).

298. See *Western States*, 9 Cal. 4th at 579, 38 Cal. Rptr. 2d at 150; Stark & Wald, *supra* note 256, at 350-51 (exceptions to federal closed record rule). For example, where an agency is challenged for having failed to act, there may be no record that explains the agency's failure. See *National Audubon Soc'y v. U.S. Forest Serv.*, 4 F.3d 832, 841-42 (9th Cir. 1993) (additional evidence permitted where agency wholly ignored an environmental consequence). Another example is mootness. See *Bruce v. Gregory*, 65 Cal. 2d 666, 670-71, 56 Cal. Rptr. 265, 267-68 (1967); *Callie v. Board of Supervisors*, 1 Cal. App. 3d 13, 18-19, 81 Cal. Rptr. 440, 443-44 (1969).

299. The Florida provision requires a closed record but also provides for remand:

When there has been no hearing prior to agency action and the reviewing court finds that the validity of the action depends upon disputed facts, the court shall order the agency to conduct a prompt, factfinding proceeding under this act after having a reasonable opportunity to reconsider its determination on the record of the proceedings.

FLA. STATS. ANN. § 120.68(6) (1982); see also *id.* §§ 120.68(11), 120.57(1). See generally L. Harold Levinson, *The Florida Administrative Procedure Act After 15 Years*, 18 FLA. ST. U. L. REV. 749, 759 (1991).

b. Giving Reasons

In my judgment, agencies should not be required to prepare written statements of findings or reasons every time they take discretionary action. Such a requirement would be wildly overbroad and unnecessary, considering the vast array of informal decisionmaking that state or local government agencies engage in on a daily basis. There should be no requirement, for example, that the agency make a contemporaneous statement of reasons why it hired A rather than B for a clerical job or selected a new computer manufactured by C rather than D.

Instead, courts or a new judicial review statute should impose an explanation requirement where an explanation is necessary for informed judicial review of discretionary agency action. If agency action is unexplained, the explanation is not obvious, and the court needs an explanation to review for abuse of discretion, it should be empowered to remand the decision to the agency to supply the necessary explanation. Otherwise, a court might uphold an agency action on the basis of some rationale that the judge invented after combing through the record or that might be suggested by agency counsel. These outcomes would contradict fundamental principles of judicial review that require a court to assess the rationality of an agency's decision, not to supply its own rationale for an unexplained decision.³⁰⁰

There are sound reasons for a rudimentary reasons requirement. In many cases, a discretionary decision must be explained; without knowing the reasons for a decision, one cannot assess whether the decision is reasonable.³⁰¹ Nor can we know whether a discretionary decision is factually supportable when the agency fails to explain the factual foundation for its choice. Moreover, where an agency is required to explain what it is doing, this imposes a certain discipline that may lessen the odds that an agency

300. See, e.g., *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) (court can uphold agency decision solely on the basis of agency's articulated rationale—not on some other rationale that the court might develop); Levin, *supra* note 134, at 261–63.

Where a court reviews the decision of another court, it can affirm the decision for reasons different than those provided in the reviewed decision. In administrative law, however, a different rule obtains. A court intrudes into the administrative sphere by supplying reasons for agency action that differ from those originally stated by the agency (if any were stated at all).

301. See Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179, 189–97; Brodie & Linde, *supra* note 267, at 555–56; Saleeby v. State Bar, 39 Cal. 3d 547, 566–68, 216 Cal. Rptr. 367, 378–80 (1985) (State Bar must explain discretionary decision not to grant award from client security fund to permit review for abuse of discretion); *California Hotel & Motel Ass'n v. Industrial Welfare Comm'n.*, 25 Cal. 3d 200, 210, 157 Cal. Rptr. 840, 846 (1979) (statement of basis for Commission's action facilitates meaningful judicial review).

will act arbitrarily.³⁰² A reasons statement helps persuade parties that an agency's decision was careful and equitable, and it helps parties decide whether or not to seek judicial review. It enhances the accountability of agency action by subjecting the agency to more informed scrutiny.³⁰³ And a generalized reasons requirement would remove a confusing aspect of existing California law—since no explanation is presently required for quasi-legislative action, courts often have to struggle with deciding whether a particular decision is adjudicative or legislative.³⁰⁴

In opposition to this recommendation, it could be argued that a reasons requirement is misdirected when applied to non-adjudicatory action; after all, legislatures need not state reasons for their actions. It could also be argued that such requirements would impose an undue burden on understaffed state or local agencies and that the reasons for many policy judgments cannot be adequately articulated, especially in collegial agencies.³⁰⁵

However, these arguments seem unconvincing. There is every reason to hold politically unaccountable agencies to higher standards than legislatures.³⁰⁶ In addition, California law already requires findings and reasons in all adjudicatory decisions reviewable under Section 1094.5 (*i.e.*, those in which an adjudicatory hearing was required), and this has not imposed an undue burden. Similarly, agencies must provide detailed explanations in the case of rules.³⁰⁷ Agency decisionmakers must have had reasons for their actions; normally in a hierarchical structure, the persons making decisions must provide written justification in order to be accountable to their superiors. Thus these explanatory statements normally provide the statement of reasons needed for review purposes.³⁰⁸ Agencies should be

302. See *Topanga Ass'n for a Scenic Community, v. County of L.A.*, 11 Cal. 3d 506, 516, 113 Cal. Rptr. 836, 842 (1974) (findings likely to prevent arbitrary land use decision).

303.

[T]he exposition requirement subjects the agency, its decision-making processes, and its decisions to more informed scrutiny by the Legislature, the regulated public, lobbying and public interest groups, the media, and the citizenry at large [B]y publicizing the policies, considerations and facts that the agency finds significant, the agency introduces an element of predictability into the administrative process [R]equiring an agency to publicly justify its orders, rules, regulations, and policies stimulates public confidence in agency action by promoting both the reality and the appearance of rational decision-making in government.

California Hotel, 25 Cal. 3d at 211, 157 Cal. Rptr. at 847.

304. See *infra* note 315.

305. Dave Frohnmayer, *National Trends in Court Review of Agency Action: Some Reflections on the Model State Administrative Procedure Act and New Utah Administrative Procedure Act*, 3 B.Y.U. J. PUB. L. 1, 9-12 (1989).

306. See Funk, *supra* note 277, at 161-64.

307. See Asimow, *supra* note 160, at 48-51.

308. See Funk, *supra* note 277, at 168.

required to disclose, rather than to conceal, such explanatory documents.³⁰⁹ Given that courts will have power to review agency action for abuse of discretion, some sort of explanation requirement is simply a necessity.

3. Factual Basis for Exercise of Discretion

The courts (or a new judicial review statute) should establish a unified standard for reviewing the factual basis of discretionary decisions. The test should be the familiar rationality standard: The factual underpinnings of the discretionary decision must be supported by substantial evidence on the whole record. The same test should apply regardless of whether the agency decision under review arose out of formal or informal adjudication, quasi-legislative action such as rulemaking, or some other function.³¹⁰

The courts should disapprove case law indicating that agency fact findings can be disturbed only if evidentiary support is "entirely lacking" or that somehow the scope of review is less intensive in abuse of discretion cases than in other cases.³¹¹ The "entirely lacking" test resembles the discredited "scintilla" standard and predates judicial recognition that the reviewing court must consider both the evidence supporting and the evidence opposing the agency's conclusion.³¹² It wrongly equates the standard for assessing whether a statute violates substantive due process with the standard for judicially reviewing agency action.³¹³ It fails to assure an adequate judicial check on agency discretionary action,³¹⁴ and therefore fails to satisfy the criteria of accuracy and acceptability.

309. If such documents are privileged pre-decisional advice memoranda from a staff member to a decisionmaker, see *supra* note 285, the ultimate decisionmaker would normally produce some document explaining his or her ultimate decision.

310. See Charles H. Koch, Jr., *An Issue-Driven Strategy for Review of Agency Decisions*, 43 ADMIN. L. REV. 511, 519-23 (1991), urging that the scope of review be the same regardless of the type of decisionmaking modality used by the agency.

311. See *supra* text accompanying note 276.

312. See *supra* text accompanying note 31. Note also that the "entirely lacking" test was supplanted, in the case of rules, by the 1982 amendment of the APA. CAL. GOV'T CODE § 11350(b) (West 1992) (calling for the substantial evidence test); see also text accompanying notes 273-274.

313. See Funk, *supra* note 277, at 161-64. In *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 n.9 (1983), the Supreme Court rejected the idea that judicial review of agency action for abuse of discretion was the same as minimum rationality review of statutes for purposes of substantive due process.

314. See *Shapell Indus., Inc. v. Governing Bd., Milpitas Unified Sch. Dist.*, 1 Cal. App. 4th 218, 232, 1 Cal. Rptr. 2d 818, 825 (1991) ("If courts shun evidentiary review as beyond their province, the reasonableness of the agency's action is relegated to the agencies themselves . . .").

This approach has the advantage of dispensing with a number of difficult distinctions: A court need not distinguish traditional from administrative mandamus, legislative fact from adjudicative fact, nor quasi-judicial action from quasi-legislative action.³¹⁵ The same standard of factual support should apply to judicial review of all discretionary action.

Although the test in all cases is substantial evidence on the whole record, the nature of the disputed facts should determine how deferential a court will be in applying the test. Where the facts are non-technical and concern the actions or motivations of a specific party, as in the review of adjudicatory penalties or a decision whether to permit a tardy filing, a court should be less deferential.³¹⁶ On the other hand, a court should be relatively deferential where the underlying facts are technical in nature and the choice depends heavily on an agency's specialized expertise,³¹⁷ where the facts are generalized rather than specific (or "legislative" rather than "adjudicative"),³¹⁸ or where the facts are determined by observation and test-

315. Numerous cases chase this will o' the wisp. See, e.g., *California Aviation Council v. City of Ceres*, 9 Cal. App. 4th 1384, 12 Cal. Rptr. 2d 163 (1992) (ordinance approving land use as consistent with airport plan is adjudicative); *Joint Council of Interns & Residents v. Board of Supervisors*, 210 Cal. App. 3d 1202, 1209-12, 258 Cal. Rptr. 762, 765-68 (1989) (decision to contract out medical services is legislative).

316. See *Shapell Industries*, 1 Cal. App. 4th at 232, 1 Cal. Rptr. 2d at 825.

The appropriate degree of judicial scrutiny in any particular case is perhaps not susceptible of precise formulation, but lies somewhere along a continuum with nonreviewability at one end and independent judgment at the other. Since the ultimate question is whether the agency has abused its discretion, the answer is one of degree. In each case the court must satisfy itself that the order was supported by the evidence, although what constitutes reasonable evidentiary support may vary depending upon the nature of the action. A proceeding which has determined individual rights in a factual context will warrant more exacting judicial review of the evidence. Otherwise courts will tend to defer to the presumed expertise of the agency acting within its scope of authority. Our case [involving assessment of school facilities fee to be paid by developers] lies toward that end of the continuum, where the focus is on the reasonableness of the agency's action as a whole.

Id., 1 Cal. Rptr. 2d at 825 (citations omitted).

317. *Industrial Welfare Comm'n v. Superior Court*, 27 Cal. 3d 690, 702, 166 Cal. Rptr. 331, 336-37 (1980), cert. denied, 449 U.S. 1029 (1980) (technical matters requiring assistance of experts and collection of statistics); *Bixby v. Pierno*, 4 Cal. 3d 130, 148-51, 93 Cal. Rptr. 234, 247-49 (1971) (fairness of reorganization—court should be deferential in applying substantial evidence test); *Security Envtl. Servs. v. South Coast Air Quality Management. Dist.*, 229 Cal. App. 3d 110, 132-33, 280 Cal. Rptr. 108, 120 (1991) (8609-page record in case involving hazardous waste incinerator licensing).

318. See *Joint Council of Interns & Residents v. Board of Supervisors*, 210 Cal. App. 3d 1202, 1209-10, 258 Cal. Rptr. 762, 765-66 (1989) (distinguishing facts that help tribunal determine the content of law and policy or help it exercise judgment or discretion from facts concerning the immediate parties); *Shapell Indus., Inc. v. Governing Bd., Milpitas Unified Sch. Dist.*, 1 Cal. App. 4th 218, 231, 1 Cal. Rptr. 2d 818, 824 (1991) (in reviewing agency determination of legislative rather than adjudicative fact under the substantial evidence test, court should be more

ing.³¹⁹ This is particularly true when the agency must make forecasts or scientific or economic judgments based on necessarily incomplete data.³²⁰ But the necessary and appropriate deference to the agency's factual judgment in these kinds of cases is not equivalent to the near-total abdication of the review function implied by the "entirely lacking" test.

4. Abuse of Discretion and Hard Look Review

a. Review for Rationality

Even if an agency's discretionary decision is factually supported and within legal constraints, a court can review the agency's choice for abuse of discretion. The court must be satisfied that the agency's outcome was rational. Case law suggesting that courts should rubber stamp certain forms of discretionary action³²¹ should be disapproved.³²²

This formulation merges the tests for evidentiary support and abuse of discretion. The substantial evidence test is based on whether a reasonable person could reach the agency's factual conclusions from the evidence.

deferential).

319. In such cases, the court should not demand that the factual basis for the decision be fully documented in the record. However, the procedure by which the facts were ascertained should be fair with adequate opportunity for challenge of the observed facts. See *Siller v. Board of Supervisors*, 58 Cal. 2d 479, 484, 25 Cal. Rptr. 73, 76 (1962) (substantial evidence satisfied through personal knowledge of neighborhood by decisionmakers).

320. See *Baltimore Gas & Elec. Co. v. National Resource Defense Council*, 462 U.S. 87, 103 (1983) (deference for agency assertions at the frontiers of science); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 595-96 (1981) (deference for forecasts of the direction in which future public interest lies). Where it was possible to gather empirical evidence on a point but the agency chose to proceed without doing so, the factual basis for its decision became questionable. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 52-54 (1983).

321. See *supra* text accompanying note 279.

322. The legislative history of the 1982 amendment to California Government Code section 11350(b) makes clear that courts should scrutinize for rationality an agency's discretionary calls about whether a regulation is reasonably necessary. Assemblyman McCarthy wrote:

Such a standard [substantial evidence] permits necessity to be demonstrated even if another decision could also be reached. This standard does not mean that the particular regulation necessarily be 'right' or the best decision given the evidence in the record, but that it be a reasonable and rational choice. It does not mean that the only decision permitted is one that OAL or a court would make if they were making the initial decision. It does not negate the function of an agency to choose between two conflicting, supportable views.

Letter from Assemblyman McCarthy to Speaker Brown, in *ASSEMBLY DAILY JOURNAL*, *supra* note 274, at 13,633-34. Since there is no obvious reason why regulations should be treated less deferentially than other forms of discretionary action, the 1982 amendment to Section 11350(b) at least suggests that courts should conduct a deferential but nevertheless meaningful form of review of all discretionary decisions.

The abuse of discretion test is based on whether a reasonable person could make the same choice as the agency did. Therefore, there is no need to draw a line between factual support and policy judgment; the two frequently blend into one another, and the test for review should be the same.

Judicial review of the rationality of agency discretionary action is a valuable and essential judicial check on agency action. It should be preserved, just as we preserve judicial review of fact, law, and procedure despite the possibility that it will be abused by courts.³²³ Agencies should not be allowed to impose unreasonable judgments, rules or policies on the general public, whether in the course of adjudication, rulemaking, or in any other function. Judicial review of the rationality of discretionary judgments can correct such abuses. Even more important, the potentiality of review strengthens the hand of those within an agency who insist on reasoned decisionmaking³²⁴ and will constrain agencies *ex ante* from rendering irrational judgments.³²⁵ Thus, judicial review for abuse of discretion appears to satisfy the criteria of accuracy, efficiency, and acceptability. Consequently, in my judgment it is appropriate to preserve judicial review for abuse of discretion.

5. Hard Look

California courts should not be encouraged to embrace hard look review. I am persuaded that courts are generally ill-suited to engage in searching review of agency policy decisions. Hard look review calls for courts to scrutinize closely the factual basis of agency choices, even though

323. See generally Funk, *supra* note 277, at 160-79. Funk's argument in favor of rationality review is compelling. He convincingly rebuts the arguments that (i) agency rules should be reviewed the same as statutes, (ii) that rationality review will introduce excessive formality into agency decisionmaking, (iii) that rationality review necessarily entails judicial substitution of judgment, and (iv) that federal rationality review should not be imported into state law since state government differs from federal government. *Id.*

324. William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 60 (1975) (the fact that a court will assess rationality of rules gives those inside the agency "who care about well-documented and well-reasoned decisionmaking a lever with which to move those who do not").

325. Funk compares the agency's obligations under federal law to prepare environmental impact statements and regulatory flexibility analyses. See Funk, *supra* note 277, at 171. Agencies take the preparation of environmental impact statements quite seriously because they are judicially reviewable. They treat regulatory flexibility analyses with contempt because they are not reviewable (legislation now pending in Congress may make them reviewable). My observation of regulatory flexibility analyses at the Internal Revenue Service confirms Funk's observations. Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 TAX LAW. 343, 370-72 (1991).

those facts are often highly technical or require difficult behavioral or scientific predictions in conditions of uncertainty. These facts often appear in very lengthy and disorganized rulemaking records. Courts engaged in hard look review often demand too much by way of explanation. For example, they may require that the agency explain why its choice is better than any other alternatives that any challenger might propose, or they insist that an agency arrange for additional factual studies to diminish uncertainties.³²⁶

Hard look also requires judges to scrutinize the reasonableness of policy choices that are often political compromises. Such compromises are difficult to defend through pure logic.³²⁷ And the effect of judicial second-guessing of agency rules has been to discourage the agency from engaging in rulemaking. As a result, the policymaking process may be paralyzed or the agency may substitute suboptimal methods of policy implementation.³²⁸ Judicial review of agency discretionary and policy decisions should remain deferential.

Because of concern about hard look review, the drafters of the 1981 Model Act left it to individual states to decide whether to allow courts to scrutinize agency action for abuse of discretion.³²⁹ The MSAPA was influenced by the Florida statute which abolished judicial review for abuse of discretion because of concern that it would lead courts to substitute judgment.³³⁰ Some states eschew review of the rationality of rules beyond the very minimal level of scrutiny accorded to statutes under substantive due process,³³¹ but most states do review for reasonableness.³³²

I see no indication that California courts have intruded on agency discretion through their power under existing law to review agency action on the grounds of abuse of discretion. On the contrary, the courts have

326. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 52-54 (1983).

327. See Breyer, *supra* note 143, at 388-94.

328. Numerous studies of "hard look" judicial review at the federal level have documented the fact that overly intrusive review can discourage agencies from pursuing rulemaking at all. See, e.g., Thomas O. McGarity, *Some Thoughts on 'Deossifying' the Rulemaking Process*, 41 DUKE L.J. 1385, 1410-26, 1451-54 (1992); see also Breyer, *supra* note 143, at 391-94.

329. MODEL STATE ADMINISTRATIVE PROCEDURE ACT OF 1981 § 5-116 cmt., 15 U.L.A. 7, 127 (1990).

330. See Brodie & Linde, *supra* note 267, at 548, 558-64 (words "arbitrary, capricious, and abuse of discretion" in statute permit judicial review by epithet—justifiably dispensed with in Florida); Frohnmayer, *supra* note 305, at 23-25 (review creates a free-floating censorial power and will contribute unnecessarily to judicial workload); Stephen T. Maher, *We're No Angels: Rulemaking and Judicial Review in Florida*, 18 FLA. ST. U. L. REV. 767, 792-99 (1991).

331. See, e.g., *Borden, Inc. v. Commissioner of Pub. Health*, 448 N.E.2d 367 (Mass.), *appeal dismissed*, 464 U.S. 923, *cert. denied*, 464 U.S. 936 (1983).

332. McGrath et al., *supra* note 11, at 778-82.

been appropriately deferential to agency fact findings and policy decisions.³³³ Therefore, the risk that courts might abuse this power by adopting the hard look approach does not seem like a good argument for abolishing the power entirely.

Short of precluding review for abuse of discretion, there is no practicable way to prevent courts from abusing their discretion in checking agency abuse of discretion. This must be left to the good sense of judges who are aware of their own limited capacities in evaluating the policy choices made by specialist agencies. And perhaps there are instances in which the presence of danger signals suggests that courts should take a harder look than normal. On the whole, however, I favor a judicial role calling for soft look review of agency discretionary action, in accordance with prevailing California doctrine.

V. JUDICIAL REVIEW OF AGENCY PROCEDURE

A. Present California Law

California courts have power to substitute judgment on the issue of whether agency action complied with the procedural provisions of statutes or the constitution.³³⁴ It is not clear, however, whether a court can impose appropriate procedures as a matter of administrative common law in order to focus the issues on judicial review or to protect private rights.

In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*,³³⁵ the United States Supreme Court held that lower courts lack authority to require agencies engaged in rulemaking to take any procedural steps not required by the constitution or by federal statutes such as the APA. It held that Congress intended, in enacting the APA, to require

333. See, e.g., *20th Century Ins. Co. v. Garamendi*, 8 Cal. 4th 216, 32 Cal. Rptr. 2d 807 (1994); *Security Envtl. Sys., Inc. v. South Coast Air Quality Management Dist.*, 229 Cal. App. 3d 110, 133, 280 Cal. Rptr. 108, 221 (1991) (recognizing agency's technical expertise in exercising discretion over hazardous waste incinerator); *Nicolle-Wagner v. Deukmejian*, 230 Cal. App. 3d 652, 657, 281 Cal. Rptr. 494, 496 (1991); *Henning v. Division of Occupational Safety & Health*, 219 Cal. App. 3d 747, 757-58, 268 Cal. Rptr. 476, 481-82 (1990); *Ford Dealers Ass'n v. DMV*, 32 Cal. 3d 347, 355-56, 185 Cal. Rptr. 453, 457-58 (1982).

334. California's administrative mandamus statute provides that "[t]he inquiry . . . shall extend to . . . whether there was a fair trial." CAL. CIV. PROC. CODE § 1094.5(b) (West 1980 & Supp. 1995); see also *California Hotel & Motel Ass'n v. Industrial Welfare Comm'n*, 25 Cal. 3d 200, 209-216, 157 Cal. Rptr. 840, 845-50 (1979) (independent judgment on whether agency complied with statutory procedures in rulemaking); *City of Fairfield v. Superior Court*, 14 Cal. 3d 768, 776, 122 Cal. Rptr. 543, 547 (1975) (court independently decides whether litigant received fair administrative trial but normally does so on the administrative record).

335. 435 U.S. 519 (1978).

only certain procedures and no others.³³⁶ In a subsequent case, the Court extended this principle to informal adjudication as to which the APA provides for no procedure at all.³³⁷ Under these cases, where no statutory or constitutional provision limits an agency's procedural discretion, the decision of how to proceed lies with the agency, not the court. *Vermont Yankee* thoroughly doused the enthusiasm of the federal courts for extra-statutory procedural innovation.³³⁸

California law does not follow *Vermont Yankee*. The California courts have occasionally mandated administrative procedures not required by any statute, either in the interest of fair procedures³³⁹ or in order to facilitate judicial review.³⁴⁰

B. Recommendations

1. Weak Deference on Procedural Issues

While courts have the power to substitute judgment on procedural issues, they should normally accord considerable deference to agency decisions about how to implement procedural provisions in general or particular statutes.³⁴¹ Agencies are often in a better position than are courts to adapt general statutory procedural norms to their own processes and resource constraints. Their expertise may be no less relevant in establishing appropriate procedure than in finding facts and determining or applying law and policy. A court that oversees the work of a particular agency only on an episodic basis may be much less qualified than the agency to determine what procedures make sense in applying a particular statute.³⁴²

336. *Vermont Yankee* was triggered by a long series of lower court cases, many from the D.C. Circuit, that imposed extra-statutory procedures on agencies, such as cross examination in rule-making. See Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345.

337. *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633 (1990).

338. Shapiro & Levy, *supra* note 261, at 406-07.

339. See, e.g., *Ettinger v. Board of Medical Quality Assurance*, 135 Cal. App. 3d 853, 185 Cal. Rptr. 601 (1982) (requirement of clear and convincing evidence to revoke professional license).

340. *Saleeby v. State Bar*, 39 Cal. 3d 547, 566-68, 216 Cal. Rptr. 367, 378-80 (1985) (requiring explanation of discretionary action to permit adequate review); *Topanga Ass'n for a Scenic Community v. County of L.A.*, 11 Cal. 3d 506, 113 Cal. Rptr. 836 (1974) (requirement that local government adjudicators explain decisions).

341. See Koch, *supra* note 310, at 542-45; Levin, *supra* note 146, at 61-62.

342. JAFFE, *supra* note 185, at 565-69; see also *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) ("In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social

Thus, in deciding whether a procedure meets statutory or constitutional requirements, weak deference is usually in order.³⁴³ Of course, the normal weak deference protocols apply here. Greater deference is due to agency procedural determinations that have been maintained consistently, are carefully considered and justified, and can plausibly be connected to the agency's experience, expertise, and specialization. Obviously, an agency's procedural choices under a general statute applicable to a variety of agencies (like the APA) is entitled to less deference than a choice made under a statute unique to the particular agency.

2. The *Vermont Yankee* Problem

The *Vermont Yankee* decision touched off a sharp dispute among judges and commentators. Clearly, *Vermont Yankee* has some advantages. It makes the law more predictable. It means that agencies need not lard up their processes with every procedural gimmick that a litigant might request lest it be second guessed years later by a reviewing court. However, many have criticized the decision as improperly curbing the ability of the courts to protect litigants, particularly in areas not governed by the APA or any other procedural statute.³⁴⁴ Moreover, the decision created confusion about which existing judicial rules were invalidated and which could survive as permissible interpretations of existing administrative procedure statutes or as associated with the substantive judicial review function.³⁴⁵

In my judgment, *Vermont Yankee* unduly inhibits the ability of the judiciary to respond creatively to real problems of unfairness and injustice in the administrative process or to unforeseen problems arising out of the judicial review function. At the same time, the decision creates a good deal of unnecessary confusion about which common law doctrines it displaces. Therefore, California should not follow *Vermont Yankee*. Our courts should retain the power to require super-statutory administrative procedures.

welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals.").

343. See *supra* Part II for discussion of weak deference.

344. Kenneth Davis excoriated the decision. 1 KENNETH DAVIS, ADMINISTRATIVE LAW TREATISE §§ 6.35-6.39 (2d ed. 1978). The criticism in the current edition, however, is muted. 1 DAVIS & PIERCE, *supra* note 22, § 7.8; see also Abner J. Mikva, *The Changing Role of Judicial Review*, 38 ADMIN. L. REV. 115 (1986).

345. For example, *Vermont Yankee* itself seemed to preserve a piece of judicial administrative common law—the requirement that judicial review be based on a closed record and on the agency's own explanation for its actions.

California may soon adopt a new APA which would mandate improved administrative procedures across a large swath of state administrative law.³⁴⁶ If a comprehensive APA were adopted (which is anything but certain, given the vagaries of the legislative process), it might be argued that the courts should be precluded from supplementing it. However, this argument is not convincing.

A great deal of California's administrative procedure would likely be untouched by a new APA. The statute presently under consideration would apply only to state agency adjudicatory decisionmaking; it would leave local government rulemaking and adjudication unregulated. Yet there is little doubt that some of the most troubling administrative procedure problems in California arise from local government proceedings. It entails an administrative law "bill of rights" for the agencies not covered by the existing APA but does not otherwise tamper with the procedures of those agencies. It omits some agencies entirely.³⁴⁷ It does not touch rulemaking (since the existing APA contains comprehensive and relatively modern provisions on rulemaking),³⁴⁸ and it leaves judicial review for another day.

Moreover, the new Act will not regulate informal adjudication. Like the federal APA,³⁴⁹ it will cover, at most, only adjudications in which a hearing is required by some other statute or by the due process clauses of the federal or state constitutions. Nor will it affect the universe of other administrative functions that are neither adjudication nor rulemaking. Nor will it contain provisions on every possible administrative law subject. For example, it will not require agencies to use rulemaking instead of adjudication or adjudication instead of rulemaking, nor will it cover such topics as equitable estoppel or *res judicata*.

Thus, a large area of administrative process will remain unregulated, even if a comprehensive APA is enacted. Yet when agencies discharge these functions, there is real potential for unfairness to regulated parties; courts should retain power to mandate procedural innovations designed to

346. See Asimow, *supra* note 1. At the time this Article is being written, the Law Revision Commission's draft of new adjudication provisions has been introduced in the California legislature. S. 523, 1994-1995 Reg. Sess. (forthcoming). A judicial review revision statute should soon follow.

347. Current drafts omit the Public Utilities Commission, the Regents of the University of California, and the Department of Corrections, among others. Other agencies may win total exemption during the legislative process.

348. CAL. GOV'T CODE § 11340 *et seq.* (West 1992 & Supp. 1995).

349. Administrative Procedure Act § 5, 5 U.S.C. § 554(a)(1988) (describing which adjudicative proceedings are covered by the Act).

solve these problems. Similarly, despite the best efforts of the Law Revision Commission and the legislature, a new APA will contain gaps that can only be revealed by future development. The courts should be able to fill them with appropriate procedures rather than being constrained by the notion that they cannot exercise creativity. All this is the common law process. It has served us well. I see no compelling need to abandon it.

Obviously, if courts err in mandating procedures, the legislature can overturn such decisions and return procedural discretion to the agencies. In contrast, *Vermont Yankee* precludes courts from taking the first step; the legislature must intervene to correct procedural injustices. It is probably better to let the courts make the first move in this game, since it is so difficult for regulated parties to get the legislature interested in their procedural problems. In contrast, it is relatively easy for agencies to persuade the legislature to alter procedural rules mandated by courts that the agencies believe are misdirected.³⁵⁰

CONCLUSION

This Article has led the reader through a vast amount of California law relating to the scope of judicial review of California state and local government agency action. This law is a hodgepodge, full of conflicting and illogical lines of case law, and encrusted with statutory and judicial barnacles that are dysfunctional under contemporary conditions. It is time for a thorough housecleaning.

The Law Revision Commission will propose a new judicial review statute to the legislature that will abandon the antiquated Section 1094.5. That statute will contain provisions for a petition for review and will codify the rules relating to standing to sue and timing of judicial review. Most important, and most controversial, it will prescribe the scope of judicial review. Clearly, these vital questions relating to judicial review are highly appropriate for legislative consideration.

California courts should not wait until the legislature acts, if it ever does, to modernize the law relating to scope of judicial review. Nothing

350. For example, after *Anton v. San Antonio Community Hospital*, 19 Cal. 3d 802, 822, 140 Cal. Rptr. 442, 453 (1977), imposed independent judgment judicial review on decisions by private hospital staffs, the legislature overturned the decision. CAL. CIV. PROC. CODE § 1094.5(d) (West 1980 & Supp. 1995). Similarly, the Board of Equalization and Franchise Tax Board persuaded the legislature to exempt their legal rulings or instructions from the rulemaking provisions of the APA. CAL. GOV'T CODE § 11342(b) (West 1992). There are countless other examples of exceptions from general procedural statutes that agencies persuaded the legislature to enact.

precludes the courts from sharply curbing or entirely abolishing the independent judgment test now. Courts should clarify the conflicting doctrines in existing case law relating to review of questions of law and of abuse of discretion. They should abandon the illogical test used to establish the scope of review of application questions.

Questions of scope of judicial review have been neglected too long. All of the players—agencies, administrative law professionals, members of the regulated public, and members of the public protected by regulation—deserve and urgently need to have the law modernized. Let us turn our hand to this vital task.

A MODERN JUDICIAL REVIEW STATUTE TO REPLACE ADMINISTRATIVE MANDAMUS *

by Michael Asimow

November 1993

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* This report was prepared for the California Law Revision Commission by Professor Michael Asimow. No part of this report may be published without prior written consent of the Commission. This report is an edited version of the original photocopied document.

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A MODERN JUDICIAL REVIEW STATUTE TO REPLACE ADMINISTRATIVE MANDAMUS

by Michael Asimow*

This is the seventh report prepared by the author for the California Law Revision Commission on revising the adjudication provisions of California's Administrative Procedure Act (APA) and modernizing the system of judicial review of state and local administrative agency action.¹ This report is the last one in the series.²

This report proposes replacement of California's antiquated provision for administrative mandamus, Code of Civil Procedure Section 1094.5. It also recommends dispensing with ordinary mandamus as a method of judicial review of agency action and repealing as well numerous other general and special provisions for obtaining review. The goal is to produce a single, straightforward statute providing the ground rules for judicial review of all forms of state and local agency action. Wherever possible, the normal

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1. Previous reports include the following: (1) "Administrative Adjudication: Structural Issues" (Oct. 1989); (2) "Appeals Within the Agency: The Relationship Between Agency Heads and ALJs" (Aug. 1990); (3) "Impartial Adjudicators: Bias, Ex Parte Contacts, and Separation of Functions" (Jan. 1991) — the first three reports were published in revised form as *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 38 UCLA L. Rev. 1067 (1992), reprinted in 25 Cal. L. Revision Comm'n Reports 321 (1995) — (4) *The Adjudication Process* (Oct. 1991), 25 Cal. L. Revision Comm'n Reports 451 (1995); (5) *Judicial Review: Standing and Timing* (Sept. 1992), 27 Cal. L. Revision Comm'n Reports 229 (1997); (6) *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157 (1995), reprinted *supra* p. 309; and (7) this report.

2. The Commission is continuing its administrative law project by evaluating the provisions relating to rulemaking and non-judicial controls over agencies.

rules of civil procedure should apply to judicial review. The underlying objective is to allow litigants and courts to reach and resolve swiftly the substantive issues in dispute, rather than to waste resources disputing tangential procedural issues.

A. REPLACING MANDAMUS

1. Existing California Law

Under existing law, on-the-record *adjudicatory* decisions of state and local government are reviewed by superior courts under the administrative mandamus provision of Section 1094.5. *Regulations* adopted by state agencies are reviewed by superior courts through actions for declaratory judgment.³ A range of miscellaneous agency action is reviewed by traditional mandamus under Section 1085⁴ or by declaratory judgment.⁵

Special review procedures are set forth in the statutes creating many agencies. Decisions of the Public Utilities Commission and of the Review Department of the State Bar Court are reviewed on a discretionary basis by the Supreme Court.⁶ Decisions of several agencies are reviewed initially by courts of appeal (in some cases as a matter of right, in some cases by discretion only).⁷ Agency action can also be reviewed in the context of enforcement actions or criminal actions brought against individuals for violation of regulatory statutes or rules. There are numerous problems with this

3. Code Civ. Proc. § 1060; Gov't Code § 11350(a). All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

4. See, e.g., *Vernon Fire Fighters v. City of Vernon*, 107 Cal. App. 3d 802, 165 Cal. Rptr. 908 (1980) (Section 1085 mandate to review whether a local rule was an abuse of discretion); *Shuffer v. Board of Trustees*, 67 Cal. App. 3d 208, 136 Cal. Rptr. 527 (1977) (Section 1085 mandate to review non-record adjudicatory academic decision of state college system).

5. See, e.g., *Californians for Native Salmon Ass'n v. Department of Forestry*, 221 Cal. App. 3d 1419, 271 Cal. Rptr. 270 (1990) (agency's general failure to observe environmental policies in issuing timber permits).

6. See Pub. Util. Code § 1756 & Cal. R. Ct. 58 (PUC); Cal. R. Ct. 952 (State Bar Court).

7. See Cal. R. Ct. 57 (Workers' Compensation Appeals Board); Cal. R. Ct. 59 (Agricultural Labor Relations Board & Public Employment Relations Board).

patchwork. Most serious is the antiquated and idiosyncratic nature of the writ of mandamus.⁸

a. Pleading complexities

Mandamus is a world of its own. A petitioner who seeks mandamus begins by serving a petition for issuance of an alternative writ of mandate on the respondent, then filing it in the trial court — the reverse of normal procedure.⁹ The judge may summarily deny the petition even though the respondent has not filed an answer or otherwise appeared.¹⁰ The respondent may file points and authorities in opposition to the issuance of an alternative writ; the court can then refuse to issue the alternative writ.¹¹ Thus mandate contains built-in provisions for a court to abort the review process before the hearing.

The court then issues an alternative writ of mandate, which is served on the respondent. The alternative writ is an order to the agency to show cause why the requested relief should not be granted.¹² The respondent then files a verified document called a

8. See generally 8 B. Witkin, *California Procedure Extraordinary Writs* (3d ed. 1985); 2 G. Ogden, *California Public Agency Practice* ch. 53 (1992) (excellent summary of writ practice in administrative cases); *California Administrative Mandamus* (Cal. Cont. Ed. Bar, 2d ed. 1989); Kostka & Robinson, *CEB Action Guide — Handling Administrative Mandamus* (1993) (51-step process). I use the terms “mandate” and “mandamus” interchangeably in this report.

9. Section 1107; 8 B. Witkin, *supra* note 8, §§ 163-64; Cal. R. Ct. 56(b) (applicable to writs in reviewing courts). For good cause, the court may grant the application *ex parte* without service on the respondent. Section 1107.

10. *Kingston v. DMV*, 271 Cal. App. 2d 549, 76 Cal. Rptr. 614 (1969) (such summary denial by trial court is a final order and is appealable). But see *Kowis v. Howard*, 3 Cal. 4th 888, 12 Cal. Rptr. 2d 728 (1992) (summary denial of writ by court of appeal is not law of the case). *Kowis* would suggest that summary denial of a petition for an alternative writ is not a final order and would not preclude a petitioner from filing a motion for a peremptory writ.

11. Section 1107; *Wine v. City Council*, 177 Cal. App. 2d 157, 2 Cal. Rptr. 94 (1960); *Patterson v. Board of Supervisors*, 79 Cal. App. 2d 670, 180 P.2d 945 (1947); Kleps, *Certiorarified Mandamus Reviewed: The Courts and California Administrative Decisions — 1949-1959*, 12 Stan. L. Rev. 554, 574 (1960).

12. Section 1087. The agency can moot the petition by complying with the alternative writ. *Save Oxnard Shores v. California Coastal Comm'n*, 179 Cal. App. 3d 140, 150, 224 Cal. Rptr. 425 (1986).

return (which serves the function either of an answer or a demurrer).¹³ Petitioner then can file a replication (or “traverse”), which is like an answer to the answer and may be needed to avoid admitting facts alleged in the return.¹⁴ In traditional but not in administrative mandamus, the statute provides for trial by jury.¹⁵

In practice, apparently many practitioners skip the alternative writ entirely and begin the case with a motion that a peremptory writ be issued.¹⁶ Whether or not the case begins with issuance of an alternative writ, the court’s final judgment is in the form of a peremptory writ of mandate, potentially enforceable against the respondent with a fine or, in the case of persistent disobedience, prison.¹⁷

13. In practice, the return is apparently called an answer or a demurrer. See 8 B. Witkin, *supra* note 8, § 177; 2 G. Ogden, *supra* note 8, § 53.10. Failure to file a return admits the factual allegations in the petition but the matter must still be heard by the court; the peremptory writ cannot be granted by default. Section 1088; *Rodriguez v. Municipal Court*, 25 Cal. App. 3d 527, 102 Cal. Rptr. 45 (1972).

14. *Elliott v. Contractors’ State Licensing Bd.*, 224 Cal. App. 3d 1048, 1054, 274 Cal. Rptr. 286 (1990); 8 B. Witkin, *supra* note 8, § 182; 2 G. Ogden, *supra* note 8, § 53.12. In *Elliott*, the agency’s return alleged that the licensee had obtained his license by fraud and the licensee failed to allege or prove the contrary. Consequently, the court correctly denied the petition for administrative mandamus on the basis of unclean hands. I believe that it is inappropriate for an agency to raise such arguments at the judicial review stage. I am informed by practitioners that the replication is almost never used in practice.

15. Section 1090. Practitioners inform me that jury trials are very rarely used in mandamus proceedings.

16. The Los Angeles Superior Court encourages this procedure in the absence of a compelling need to appear *ex parte*. L.A. Superior Court Law and Discovery Manual V-D-2-a. The court can issue a peremptory writ without first issuing an alternative writ where the papers on file adequately address the issues, no factual dispute exists, additional briefing is unnecessary, the opposing party receives ten days notice and an opportunity to oppose this relief, and the court first issues an order that the writ will be issued. If petitioner seeks only a peremptory writ, it need not serve it on the respondent before filing the application. Sections 1088, 1088.5, 1107; *Palma v. U. S. Indus. Fasteners, Inc.*, 36 Cal. 3d 171, 203 Cal. Rptr. 626 (1984) (peremptory writ issued by appellate court). See 2 G. Ogden, *supra* note 8, §§ 53.01[2][c], 53.08.

17. Section 1097 (\$1000 fine); 8 B. Witkin, *supra* note 8, § 192.

b. Limitations on traditional mandamus

Traditional (as opposed to administrative) mandamus is limited by an arcane set of rules. It issues where the plaintiff seeks to enforce a ministerial (i.e., non-discretionary) duty owed by the defendant to the plaintiff¹⁸ and to which plaintiff has a “clear” and “present” right;¹⁹ it also can issue for abuse of discretion, which sometimes is limited to “clear” abuse.²⁰ The writ cannot be issued where there is a plain, speedy, and adequate remedy at law.²¹ These esoteric rules give rise to many difficulties when traditional mandamus is used for the purpose of reviewing agency action.²²

c. Distinctions between traditional and administrative mandamus

In many cases, it is uncertain whether an action should be brought under administrative mandamus (Section 1094.5) or traditional mandamus (Section 1085) or declaratory judgment (Section 1060). An action that could be brought under Section 1094.5 must be brought under that section. People persistently file under the

18. *Gilbert v. State*, 218 Cal. App. 3d 234, 241, 266 Cal. Rptr. 891 (1990); *Harbach v. El Pueblo de Los Angeles State Historical Monument Comm’n*, 14 Cal. App. 3d 828, 92 Cal. Rptr. 757 (1971) (agency had ministerial duty to relocate building within monument after approving resolution and soliciting funds to do so).

19. *Wasko v. California Dep’t of Corrections*, 211 Cal. App. 3d 996, 1000, 259 Cal. Rptr. 764 (1989); 8 B. Witkin, *supra* note 8, § 65 *et seq.*

20. *Better Alternatives for Neighborhoods v. Heyman*, 212 Cal. App. 3d 663, 671, 260 Cal. Rptr. 758 (1989); *Thelander v. City of El Monte*, 147 Cal. App. 3d 736, 748, 195 Cal. Rptr. 318 (1983). A local agency rule not reasonably based on the rulemaking record could be invalidated under Section 1085 apparently because adoption of such a rule is an abuse of discretion.

21. Section 1086; *ABI, Inc. v. City of Los Angeles*, 153 Cal. App. 3d 669, 688, 200 Cal. Rptr. 563 (1984) (mandate unavailable where contract action would lie, but exception for cases where there is a dispute as to interpretation of statute); *Culver City v. State Bd. of Equalization*, 29 Cal. App. 3d 602, 105 Cal. Rptr. 602 (1972) (mandamus denied — quasi-contract available); *Wenzler v. Municipal Court*, 235 Cal. App. 2d 128, 45 Cal. Rptr. 54 (1965) (same).

22. See Moskovitz, *Spinning Gold Into Straw: The Ordinary Use of the Extraordinary Writ of Mandamus to Review Quasi-Legislative Actions of California Administrative Agencies*, 20 Santa Clara L. Rev. 351 (1980). This is a forceful and persuasive argument that mandamus is the wrong remedy for the review of quasi-legislative administrative action.

wrong section. Normally, after a skirmish between the parties about which writ was proper, the trial court excuses the error and allows petitioner to proceed under the proper writ.²³ On appeal, however, at least according to some cases, if the trial court used the wrong writ the case must be reversed so the case can be retried under the proper procedure — even if nobody objected!²⁴

Trial courts must distinguish between the writs, since there are numerous differences between Section 1085 and 1094.5 procedure. As already mentioned, juries might be used in traditional mandamus but are not used in administrative mandamus. The statute of limitations is different.²⁵ The rule about exhaustion of remedies is different.²⁶ Section 1094.5 has a clear provision concerning stays;²⁷ the availability of a stay is unclear under Section 1085.²⁸ Section 1094.5 clearly specifies that the administrative decision is reviewed on the record made before the agency.²⁹ Section 1085 is unclear about whether the court should make a new record³⁰ or

23. See, e.g., *Scott v. City of Indian Wells*, 6 Cal. 3d 541, 546, 99 Cal. Rptr. 745 (1972) (P sought declaratory judgment to review grant of conditional use permit, Section 1094.5 was correct remedy).

24. *Eureka Teachers Ass'n v. Board of Educ.*, 199 Cal. App. 3d 353, 244 Cal. Rptr. 240 (1988) (citing conflicting cases on whether the error can be waived).

25. See, e.g., *Griffin Homes, Inc. v. Superior Court*, 229 Cal. App. 3d 991, 1003-07, 280 Cal. Rptr. 792 (1991). Sections 1094.5 and 1094.6 have 30- and 90-day limitation periods; other review statutes have different limitation periods. However, there is no statute of limitations on a Section 1085 mandate proceeding other than the normally applicable three- or four-year statutes or laches. Unfortunately, this difference will remain under the revised statute.

26. *Bollengier v. Doctors Medical Ctr.*, 222 Cal. App. 3d 1115, 1125, 272 Cal. Rptr. 273 (1990).

27. Section 1094.5(g)-(h).

28. Presumably a petitioner who seeks a stay as part of a Section 1085 action must request a preliminary injunction.

29. In independent judgment cases, the court can admit new evidence if with reasonable diligence it could not have been produced at the administrative hearing or if it was improperly excluded at the administrative hearing. Section 1094.5(e).

30. See Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157 1226-27 (1995) (reprinted

whether it should be limited to the record made before the agency or whether it should start with that record and then permit it to be supplemented by new evidence. Probably a declaratory judgment action is tried on a new record. The requirement that an agency make findings is not the same under the two writ sections.³¹ Of particular importance, the scope of review of factual issues is different between the two sections; Section 1094.5 calls for a choice between independent judgment and substantial evidence.³² The scope of review of factual determinations under Section 1085 is unclear; it might be identical to substantial evidence or it might be a highly deferential “no evidence” standard.³³

supra, 27 Cal. L. Revision Comm’n Reports 309); *Del Mar Terrace Conservancy, Inc. v. City Council of San Diego*, 10 Cal. App. 4th 712, 725-26, 741-44, 12 Cal. Rptr. 2d 785 (1992) (trial court should have admitted new evidence in 1085 proceeding but error not prejudicial); L.A. Superior Court Law and Discovery Manual V-D-5 (in mandamus proceeding not under Section 1094.5 evidence can be in form of declarations, deposition or, in court’s discretion, oral testimony).

31. See, e.g., *California Aviation Council v. City of Ceres*, 9 Cal. App. 4th 1384, 12 Cal. Rptr. 2d 163 (1992) (land use decision adjudicatory so better findings required); *Eureka Teachers Ass’n v. Board of Educ.*, 199 Cal. App. 3d 353, 244 Cal. Rptr. 240 (1988).

32. The scope of review issue is discussed in Asimow, *supra* note 30.

33. *Strumsky v. San Diego County Employees Ret. Ass’n*, 11 Cal. 3d 28, 34 n.2, 112 Cal. Rptr. 805 (1974). See *Shapell Indus., Inc. v. Governing Bd.*, 1 Cal. App. 4th 218, 232-33, 1 Cal. Rptr. 2d 818 (1992) (courts must review evidence in case reviewing legislative action but more deferentially than in case of adjudicatory action); *Taylor Bus Serv. v. San Diego Bd. of Educ.*, 195 Cal. App. 3d 1331, 1340, 241 Cal. Rptr. 379 (1988) (scope of review under Section 1085 mandamus is “entirely lacking in evidence” — which means “substantial evidence”!). My previous study on scope of review recommended unifying the scope of review of factual determinations underlying discretionary decisions. The scope of review should not vary as between adjudicatory and legislative actions, but appropriate deference should be given to factual determinations based on the agency’s expertise; for example, courts must be cautious about second-guessing agency factual determinations that are technical in nature or which involve economic or scientific guesswork or predictions. See Asimow, *supra* note 30, at 1241-42.

d. When Section 1094.5 applies

Whether a particular case falls under Section 1094.5 or Section 1085 depends on several factors.

First, Section 1094.5 applies only where “by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination in the determination of facts is vested in” the agency.³⁴ Where a statute, a regulation, or the constitution calls only for some agency procedure but not explicitly for a formal hearing, it is unclear whether Section 1094.5 is available. Some cases imply a right to a hearing from statutes that provide only for an “administrative appeal” or some such term; others do not.³⁵ A

34. See *Civil Serv. Comm'n v. Velez*, 14 Cal. App. 4th 115, 17 Cal. Rptr. 2d 490 (1993) (Section 1094.5 applicable to claim that agency denied a hearing when one was required).

35. Statute requires on-the-record hearing, so Section 1094.5 applies: *Eureka Teachers Ass'n v. Board of Educ.*, 199 Cal. App. 3d 353, 244 Cal. Rptr. 240 (1988) (teacher's right to appeal a grade change by superintendent was a right to hearing — Section 1094.5 applies); *Chavez v. Civil Serv. Comm'n*, 86 Cal. App. 3d 324, 150 Cal. Rptr. 197 (1978) (right of “appeal” means a required hearing — Section 1094.5 available); *Jean v. Civil Serv. Comm'n*, 71 Cal. App. 3d 101, 139 Cal. Rptr. 303 (1977) (hearing implied from statute that permits dismissal only for cause — Section 1094.5 applies).

Statute does not require an on-the-record hearing so Section 1094.5 does not apply: *Saleeby v. State Bar*, 39 Cal. 3d 547, 560-62, 216 Cal. Rptr. 367 (1985) (Bar's failure to provide for hearings in its rules concerning client security fund was quasi-legislative — Section 1085 applies even though plaintiff seeks a hearing); *Keeler v. Superior Court*, 46 Cal. 2d 596, 297 P.2d 967 (1956) (no hearing required for 10-day suspension); *Taylor Bus Serv. v. San Diego Bd. of Educ.*, 195 Cal. App. 3d 1331, 1340, 241 Cal. Rptr. 379 (1988) (in case of bid rejected for nonresponsiveness, due process applies but does not require a hearing — review is under Section 1085 — contra for bid rejected for non-responsibility); *Wasko v. Department of Corrections*, 211 Cal. App. 3d 996, 1001-02, 259 Cal. Rptr. 764 (1989) (prisoner's right to appeal decision relating to his welfare does not require a hearing — Section 1094.5 does not apply); *Marina County Water Dist. v. State Water Resources Control Bd.*, 163 Cal. App. 3d 132, 209 Cal. Rptr. 212 (1984) (hearing was discretionary, not required); *Weary v. Civil Serv. Comm'n*, 140 Cal. App. 3d 189, 189 Cal. Rptr. 442 (1983) (hearing on employee performance rating was discretionary rather than required — Section 1094.5 inapplicable); *Lightweight Processing Co. v. County of Ventura*, 133 Cal. App. 3d 1042, 1048, 184 Cal. Rptr. 479 (1982) (“appeal” not equivalent to a hearing — declaratory judgment, not Section 1094.5, is proper writ to test decision requiring environmental impact statement); *Shuffer v. Board of Trustees*, 67

new judicial review statute should eliminate the need to decide whether the statute called for some sort of on-the-record hearing; judicial review of adjudicatory decisions would be the same regardless of whether a formal hearing was provided. However, the adjudication sections of the new APA draft will probably preserve this distinction, for they apply only if a statute or constitution calls for the sort of on-the-record hearing to which Section 1094.5 presently applies.³⁶

If Section 1094.5 does not apply because no hearing is required and no other remedy is available, a plaintiff must fall back on traditional mandate under Section 1085. But then petitioner must confront the barriers to traditional mandamus, such as the requirement that mandamus applies only in the case of deprivation of a clear legal right or an abuse of discretion.³⁷ If traditional mandate is unavailable for these reasons, the case falls through the cracks and is unreviewable.

Cal. App. 3d 208, 136 Cal. Rptr. 527 (1977) (Section 1085 appropriate to review academic decision of state university); *Royal Convalescent Hosp. v. State Bd. of Control*, 99 Cal. App. 3d 788, 160 Cal. Rptr. 458 (1979) (Board of Control not required to provide hearing on rejected claim — Section 1094.5 unavailable). Still unclear is whether the right to an “administrative appeal” in the Public Safety Officers Procedural Bill of Rights triggers Section 1094.5 review; more than likely, it does. See Gov’t Code § 3304(b).

36. See Section 641.110(a) in administrative adjudication draft attached to staff memorandum 92-70 (Oct. 9, 1992). [Ed. note. This provision is now in Government Code Section 11410.10.]

37. See *Wasko v. Department of Corrections*, 211 Cal. App. 3d 996, 1002, 259 Cal. Rptr. 764 (1989) (neither Section 1094.5 nor Section 1085 available to review prison decision); *Weary v. Civil Serv. Comm’n*, 140 Cal. App. 3d 189, 189 Cal. Rptr. 442 (1983); *Taylor v. California State Personnel Bd.*, *supra* note 35 (short suspension — statutory procedures do not amount to a required “hearing” so Section 1094.5 not available and Section 1085 inapplicable without a “clear” abuse of discretion). *Contra Los Angeles County Dep’t of Parks & Recreation v. Civil Serv. Comm’n*, 8 Cal. App. 4th 273, 278, 10 Cal. Rptr. 2d 150 (1992) (substantial evidence review regardless of whether Section 1094.5 or 1085 applies); *Coelho v. State Personnel Bd.*, 209 Cal. App. 3d 968, 257 Cal. Rptr. 557 (1989) (suspension without substantial evidence is clear abuse of discretion under Section 1085).

A second factor in deciding whether a case falls under Section 1094.5 or Section 1085 is the problematic distinction between quasi-legislative and quasi-judicial action. Section 1094.5 applies only to cases that are considered quasi-judicial; quasi-legislative agency action is reviewed under Section 1085 or 1060.³⁸ While the adjudication/legislation distinction is clear at the poles,³⁹ there is a large middle ground where the distinction is not clear at all.⁴⁰ The cases are muddled, particularly in connection with local land use planning and environmental decisions.⁴¹

38. *Brock v. Superior Court*, 109 Cal. App. 2d 594, 241 P.2d 283 (1952).

39. Adjudicatory matters affect an individual as determined by facts peculiar to the individual, whereas legislative decisions involve the adoption of a broad, generally applicable rule of conduct on the basis of public policy. *San Diego Bldg. Contractors Ass'n v. City Council*, 13 Cal. 3d 205, 118 Cal. Rptr. 146 (1974) (adoption of general zoning ordinance is legislative); *Meridian Ocean Sys., Inc. v. California State Lands Comm'n*, 222 Cal. App. 3d 153, 271 Cal. Rptr. 445 (1990) (general decision to exempt geophysical research from EIR requirements is legislative even though triggered by particular application). Alternatively, a legislative action is the formulation of a rule to be applied to future cases, while an adjudicatory act involves the application of such a rule to a specific set of existing facts. *Strumsky v. San Diego County Employees Ret. Ass'n*, 11 Cal. 3d 28, 34 n.2, 112 Cal. Rptr. 805 (1974).

40. See, e.g., *California Radioactive Materials Management Forum v. Department of Health Servs.*, 15 Cal. App. 4th 841, 19 Cal. Rptr. 2d 357, 371 (1993), which deals with the appropriate administrative procedure for the licensing of a low-level radioactive waste disposal facility. Holding that DHS was not required by the ambiguous statute to hold an APA-type adjudicative hearing, the court declared that the case presented a mixture of quasi-judicial and quasi-legislative functions.

41. A sampling of decisions considered adjudicative: *Horn v. County of Ventura*, 24 Cal. 3d 605, 613-16, 156 Cal. Rptr. 718 (1979) (adoption of a tentative subdivision map filed by individual developer); *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 517, 113 Cal. Rptr. 836 (1974) (zoning variance); *California Aviation Council v. City of Ceres*, 9 Cal. App. 4th 1384, 12 Cal. Rptr. 2d 163 (1992) (adoption of ordinance approving road corridor); *Pacifica Corp. v. City of Camarillo*, 149 Cal. App. 3d 168, 196 Cal. Rptr. 670 (1983) (allocation of residential development rights to competing applicants); *Patterson v. Central Coast Regional Comm'n*, 58 Cal. App. 3d 833, 130 Cal. Rptr. 169 (1976) (application for coastal development permit).

Decisions considered legislative: *Arnel Dev. Co. v. City of Costa Mesa*, 28 Cal. 3d 511, 169 Cal. Rptr. 904 (1980) (zoning ordinance preventing development of a single property); *Del Mar Terrace Conservancy, Inc. v. City Council*,

A new statute should strive to avoid the legislative/adjudicative distinction wherever possible.⁴² Unfortunately, my recommendations do not completely avoid the distinction; the statute of limitations on judicial review turns on whether a decision is adjudicatory⁴³ as does the determination of whether procedural due process applies.⁴⁴

10 Cal. App. 4th 712, 726-29, 12 Cal. Rptr. 2d 785 (1992) (decision to certify environmental impact statement as complete and to proceed with road building project); *Joint Council of Interns & Residents v. Board of Supervisors*, 210 Cal. App. 3d 1202, 1209-12, 258 Cal. Rptr. 762 (1989) (decision that contracting out jobs is cost-effective); *Oceanside Marina Towers Ass'n v. Oceanside Community Dev. Comm'n*, 187 Cal. App. 3d 735, 231 Cal. Rptr. 910 (1987) (selection of site for public improvement); *Karlson v. City of Camarillo*, 100 Cal. App. 3d 789, 798-99, 161 Cal. Rptr. 260 (1980) (amendment of general plan to rezone particular property); *Marina County Water Dist. v. State Water Resources Control Bd.*, 163 Cal. App. 3d 132, 209 Cal. Rptr. 212 (1984) (water quality control plan); *Consaul v. City of San Diego*, 6 Cal. App. 3d 1781, 8 Cal. Rptr. 2d 762 (1992) (rezoning of property, even a single parcel, to prevent development — unclear to court whether decision in question was legislative or adjudicative); *Wilson v. Hidden Valley Mun. Water Dist.*, 256 Cal. App. 2d 271, 63 Cal. Rptr. 889 (1967) (application to exclude property from water district legislative since issues were political).

The Supreme Court majority in *Arnel* seems to concede that there is not much logic to this body of law but that it is important to have well-settled categories to avoid even more confusion in the law.

42. I hope the Law Revision Commission will recommend a statute unifying the scope of review for both legislative and adjudicative action so it will not be necessary to draw the distinction for determining scope of review. See Asimow, *supra* note 30, at 1240-41.

43. See proposed Sections 1123.630-1123.640 in the Commission's recommendation on *Judicial Review of Agency Action*, beginning *supra* p. 45, stating a 30- or 90-day limitation period on review of a decision in an adjudicative proceeding but no statute of limitations on non-adjudicatory action. "Decision" is defined in Section 1121.250 as "an agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person." Probably the comment to Section 1121.250 should state that the existing body of law on the legislation-adjudication distinction is intended to be preserved.

44. *Horn v. County of Ventura*, 24 Cal. 3d at 613-16. Numerous other issues, such as the application of administrative *res judicata*, also turn on the distinction.

2. Federal Law and Law of Other States

In federal practice, common law writs have never played a significant role. In most cases federal statutes relating to specific agencies explicitly define the procedure for obtaining review. Where such specific guidance is lacking, review is normally sought through an action for an injunction or declaratory judgment. There is normally no need to pursue such questions as whether action is quasi-judicial or quasi-legislative. By statute, mandamus is also available,⁴⁵ but there are many unsettled questions about federal mandamus practice. Practitioners are advised to avoid mandamus since injunction and declaratory judgment are not encumbered by technical limitations and are usually adequate to obtain any desired relief.⁴⁶

Older judicial review statutes of other states show mixed success in shedding the complexities of the common law writs. Many states still use the common law writ system.⁴⁷ In New York, review is sought through an Article 78 proceeding in lieu of the writs of certiorari, mandamus, and prohibition.⁴⁸ However, all of the ancient rules and distinctions of writ practice are preserved in Article 78 proceedings, so a large amount of complexity and confusion remain; for a variety of purposes the courts must continue to distinguish administrative, quasi-legislative and quasi-judicial proceedings.⁴⁹ New York's judicial review statute should not be emulated.

45. 28 U.S.C. § 1361.

46. 4 K. Davis, *Administrative Law Treatise* § 23.11 (2d ed. 1983).

47. B. Schwartz, *Administrative Law* 584 (3d ed. 1991). New Jersey allows judicial review of agency action through the writ of certiorari. *Ward v. Keenan*, 70 A.2d 77 (N.J. 1949). Apparently it has successfully avoided the complexities of common law writ practice. Schwartz, *supra* at 585-86.

48. N.Y. Civ. Prac. L. & R. § 7801 *et seq.* (McKinney 1981 & Supp. 1993).

49. Since Article 78 dates back to 1937, it was actually a pioneering effort. See Weintraub, *Statutory Procedures Governing Judicial Review of Administrative Action: From State Writs to Article 78 of the Civil Practice Law and Rules*, 38 St. Johns L. Rev. 86 (1963); McLaughlin, "Practice Commentary," 7B McKinney's Consolidated Laws of N.Y. Ann. 25-38 (1981). As an example of the unsatisfactory character of Article 78, see *Lakeland Water Dist. v. Onondaga County Water Authority*, 24 N.Y.2d 400, 301 N.Y.S.2d 1 (1969) (Article 78

The 1961 Model State APA, on which the law of numerous states is based, provides for judicial review of rules through an action for declaratory judgment and for review of formal adjudication through an appeal; it makes no provision for review of informal adjudication.⁵⁰ Illinois permits review by petition to the circuit court but only if the enabling statute of the particular agency adopts the provisions of the Review Act; moreover the statute apparently applies only to adjudicatory decisions, not regulations.⁵¹ Pennsylvania has separate provisions for judicial review of state and local adjudicatory actions.⁵² The Utah statute has separate provisions for review of rules, formal adjudicatory decisions, and informal adjudicatory decisions; only state agencies are covered by these provisions.⁵³

The modern trend in judicial review statutes is to draw no distinction between rulemaking and adjudication and to assimilate judicial review to other types of litigation. Under the 1981 MSAPA, judicial review is initiated by filing a petition for review in the appropriate court; the court can grant any appropriate form of relief.⁵⁴ MSAPA also provides for a petition by an agency to

inapplicable to review of ratemaking that occurs without a hearing because it is "legislative" action — case continues as declaratory judgment). The annotations to Section 7801 (the section authorizing review and only the first of six provisions in the New York scheme) run for 236 pages of microscopic print in the 1981 Annotated Code and an additional 82 pages in the 1993 supplement.

50. See Project, *State Judicial Review of Administrative Action*, 43 Admin. L. Rev. 571, 705-08 (1991).

51. See Ill. Ann. Stat. ch. 735, para. 5/3-101 *et seq.* (Smith-Hurd 1992).

52. Pa. Stat. Ann. tit. 2, §§ 701, 751 (Supp. 1993). However, there is no provision for review of non-adjudicatory agency action. See Note, 16 Duq. L. Rev. 201 (1977).

53. Utah Code Ann. §§ 63-46a-12.1 (declaratory judgment to review rules), 63-46b-15 (informal adjudicatory proceedings reviewed de novo in trial court), 63-46b-16 (formal adjudicatory proceedings reviewed on the record in appellate court) (1989 & Supp. 1992). See Thorup, *Recent Developments in State Administrative Law: The Utah Experience*, 41 Admin. L. Rev. 465, 467-73 (1989).

54. MSAPA §§ 5-105, 5-117. This is modeled on the Florida statute which provides for review of any form of state agency action by filing a petition in the district court of appeal which can grant any appropriate form of relief. Fla. Stat.

enforce its own rule or order, which seems like a useful provision.⁵⁵ However, the MSAPA applies only to review of actions of state, not to actions of local agencies.

In 1991, an Oregon advisory committee prepared a carefully drafted statute; it provides that review of any form of state or local government action is initiated by filing a notice of intent to appeal and any appropriate relief can be granted.⁵⁶ It was not enacted, however. Wyoming has a similar provision for trial court review of any action of any state or local agency.⁵⁷ The Washington statute calls for initiating review through a petition in the trial court for judicial review of any state agency action.⁵⁸

3. Recommendation

The statute should provide that final state or local agency action⁵⁹ is reviewable by a petition for judicial review⁶⁰ filed with

Ann. § 120.68(2), (13) (West 1982 & Supp. 1993). Judicial review is exclusively on the record, but if no hearing has been held and the validity of the agency action depends on disputed facts, the court can remand for a prompt factfinding proceeding. *Id.* § 120.68(4), (5), (6).

The 1981 Model State Administrative Procedure Act is printed in 15 U.L.A. 1 (1990) [hereinafter MSAPA].

55. MSAPA §§ 5-201, 5-202.

56. H.R. 2362, 66th Oregon Legislative Assembly, 1991 Regular Session, §§ 6, 22.

57. Wyo. Stat. § 16-3-114 (1977 & Supp. 1992). The Wyoming statute is quite concise and leaves many questions to be resolved by rules to be adopted by the Wyoming Supreme Court. These rules cover questions of the content of the record, pleadings, time and manner for filing pleadings and records, and extent to which supplemental evidence can be taken.

58. Wash. Rev. Code § 34.05.514(1) (1990). See Andersen, *The 1988 Washington Administrative Procedure Act — An Introduction*, 64 Wash. L. Rev. 781, 822 (1989).

59. The statute should contain a definition of agency action like that in MSAPA Section 1-102(2), which covers all possible actions or inactions. Certain agency actions now reviewable by de novo trials in superior court should not be reviewable under this statute. See *infra* text accompanying notes 75-79.

60. The existing writ of certiorari is called a “writ of review” in California. The petition for judicial review recommended here is wholly different from common law certiorari.

the appropriate court.⁶¹ Normal pleading and practice rules for that court would be applicable.⁶² The use of common law writs, such as mandamus, certiorari, and prohibition, and the use of equitable remedies, such as injunction and declaratory judgment, should be abolished in cases involving judicial review of agency action.⁶³ The court should be empowered to provide for any appropriate form of relief — declaratory, mandatory or otherwise;⁶⁴ it should be permitted to remand for further proceedings or simply reverse outright.⁶⁵ There should be appropriate provision for filing the

61. The court in which review should be sought is discussed *infra* in text accompanying notes 79-112. Of course, reviewability is conditioned on the plaintiff satisfying the requirements of standing and timing (exhaustion, finality, ripeness, or primary jurisdiction) or establishing that an exception to those rules is applicable.

62. Although discovery rules would apply to these proceedings, the statute or the comment should make it clear that discovery would only be available to obtain evidence that would be admissible in the judicial review proceeding. See *City of Fairfield v. Superior Court*, 14 Cal. 3d 768, 122 Cal. Rptr. 543 (1975). At present, the Commission's draft statute provides for a closed record in many judicial review cases; if the record is inadequate for judicial review, the court should generally remand to the agency to develop the necessary materials or make the requisite findings. See draft Sections 1123.810, 1123.850. *Cf.* *Camp v. Pitts*, 411 U.S. 138 (1973). The statute should not permit any other discovery proceedings in court. But see *Mobil Oil Corp. v. Superior Court*, 59 Cal. App. 3d 293, 130 Cal. Rptr. 814 (1976), which allowed discovery of evidence that could not be admitted in court but with respect to which the court could remand to the agency. See Section 1094.5(e)-(f) (court can remand to agency to receive evidence that in the exercise of reasonable diligence could not have been produced at the hearing or was improperly excluded at the hearing).

63. Of course those writs would continue to be available in cases not involving agency action. The Commission has yet to resolve whether writ practice should be retained in certain narrow areas of agency action such as denial of a continuance by an agency presiding officer.

64. However, it should not be empowered to award money damages unless provided by some other statute, such as provisions relating to an award of attorneys' fees or costs. See MSAPA §§ 5-117(a), (c) (no damages or compensation unless otherwise provided), 5-117(b) (any other appropriate relief, whether mandatory, injunctive, or declaratory; preliminary or final; temporary or permanent; equitable or legal).

65. MSAPA § 5-117(b); *Newman v. State Personnel Bd.*, 10 Cal. App. 4th 41, 12 Cal. Rptr. 2d 601 (1992) (where employing agency failed to sustain its

administrative record with the court.⁶⁶ Service of process would be according to normal practice.⁶⁷

Present law allows a reviewing court to affirm an agency decision in summary fashion without granting argument. In mandate practice, the trial court apparently can decline to issue an alternative writ either before or after the respondent files a return and submits points and authorities, although it is unclear whether such decision is a final order.⁶⁸ In court of appeal and Supreme Court practice, the court can decline to grant a writ of review.⁶⁹ The

burden of proof that employee should be discharged, Personnel Board decision should be reversed, not remanded for further proceedings).

66. See 2 G. Ogden, *supra* note 8, § 53.14. Normally, the record is prepared by the respondent on request of the petitioner after the payment of appropriate fees. It is then filed with the petition. However, the record can also be filed with the respondent's points and authorities or subsequently. Sections 1094.5(a), 1094.6(c); Gov't Code § 11523. If petitioner timely requests a transcript, the statute of limitations on filing a petition is tolled until the transcript is delivered. proposed Sections 1123.630-1123.640 in the Commission's recommendation on *Judicial Review of Agency Action*, beginning *supra* p. 45 The provisions relating to filing the record with the court may differ depending on whether review is in a trial court or the court of appeal. See *infra* text accompanying notes 79-112. I have not tried to deal with the details concerning the transcript and the record; agencies will have to tell us what provisions will be practicable in their particular situations.

67. Section 1107 provides for service on an agency's presiding officer, secretary, or upon a majority of the members of the agency. Perhaps all agencies should be required to designate by rule an employee on whom process would be served. In default thereof, the rules of Section 1107 could continue to apply.

68. See *supra* text accompanying notes 11-12.

69. Summary denial is common in cases of writs seeking review of decisions of the Workers' Compensation Appeals Board; the court summarily affirms after considering the petition and the answer. See California Workers' Compensation Practice § 11.76 (Cal. Cont. Ed. Bar 1985); *Lavore v. Industrial Accident Comm'n*, 29 Cal. App. 2d 255, 84 P.2d 176 (1938) (upholding constitutionality of procedure and praising its practicality). In reviewing decisions of the Agricultural Labor Relations Board, the court of appeals has power to summarily deny a petition, but only after the record has been lodged with the court and both parties have a reasonable opportunity to file points and authorities. *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.*, 24 Cal. 3d 335, 351, 156 Cal. Rptr. 1 (1979); *Agricultural Labor Relations Bd., v. Abatti Produce, Inc.*, 168 Cal. App. 3d 504, 214 Cal. Rptr. 283 (1985). The Supreme Court has discretion

revised statute should maintain this authority in both superior court and the court of appeal, provided that the agency record is filed with the court and the party seeking review has a fair chance to oppose summary affirmance.

Petitions for judicial review should receive the same priority in the setting of a hearing as is presently accorded to writs.⁷⁰ Some superior courts handle their writ practice in special writs and receivers departments that decide the cases swiftly; this practice should be maintained. Other courts treat writs in the law and motion department and also set hearings on the peremptory writs quite quickly. Typically petitions for judicial review will be accompanied by a request for a stay of the agency action in question.⁷¹ Stay requests should be given priority consideration, whether the case is in the court of appeal or the superior court. In a later portion of this report, I suggest that many judicial review cases now considered in superior court be shifted to the court of appeal; one disadvantage of this proposal is that it would be difficult to give judicial review cases any priority on the court of appeal calendar, although stay motions could probably be disposed of quickly by the court of appeal.

The statute should provide that an agency can seek enforcement of a rule or order (including a subpoena) through a petition for civil

to refuse to grant a writ in PUC and State Bar Court cases. See Lakusta & Renton, *California Supreme Court Review of Decisions of the Public Utilities Commission — Is the Court's Denial of a Writ of Review a Decision on the Merits?*, 39 Hastings L.J. 1147 (1988) (summary affirmance of 90% of PUC decisions); Cal. R. Ct. 952 (State Bar Court).

70. See Cal. R. Ct. 2103(b) (general rule exempts writ practice from setting rules for civil litigation), 1907(b) (fast track). I am not certain whether or how the proposed statute should deal with the priority issue. One possibility is to require that a petitioner must request a hearing on the petition within 90 days of filing, as required by Public Resources Code Section 21167.4 for petitions alleging noncompliance with CEQA. See *Dakin v. Department of Forestry*, 17 Cal. App. 4th 681, 21 Cal. Rptr. 2d 490 (1993) (90-day rule applies to challenge of timber harvest plan).

71. The standards for granting a stay are discussed *infra* in text accompanying notes 126-31.

enforcement.⁷² But the statute should preserve the right to obtain review by way of defense; where government proceeds against a party civilly or criminally, the defense may be based upon the invalidity of some prior agency action such as a regulation that the party had not sought to review.⁷³ It would be unfair to preclude judicial review in this situation, since many respondents would never have known of the rule until it was used against them.

The statute should exclude various kinds of government actions that are reviewable in other ways according to statute.⁷⁴ Thus the statute should not be applied where a statute provides that agency action is reviewable through a *de novo* trial in superior court, as in the case of tax refund actions.⁷⁵ It should not cover actions review-

72. MSAPA §§ 5-201, 5-202. As to subpoenas, see *id.* § 4-210(b); Gov't Code § 11187.

73. See MSAPA § 5-203. Of course, this rule is conditioned by normal *res judicata* principles. For example, if the enforcement action is based upon violation of an order entered after a prior adjudication, it would be inappropriate to relitigate the issues resolved in the prior litigation.

74. If a person seeks judicial review but should have proceeded via another form of action, the court should convert the petition for judicial review into the other recognized form of review and, if necessary, transfer the case to the correct court. This prevents the statute of limitations from running on the plaintiff's claim. The action should not be dismissed simply because the wrong form of relief was sought. Thus, cases like *Wenzler v. Superior Court*, 235 Cal. App. 2d 128, 45 Cal. Rptr. 54 (1965), should be disapproved. In *Wenzler*, plaintiff sought mandate to seek return of a fine he had paid and of evidence that was seized from him after his conviction was reversed; mandate was dismissed because plaintiff should have proceeded by way of a quasi-contract action.

Existing law provides that where the claim is for inverse condemnation arising out of action by an administrative agency, the claimant should seek judicial review of the agency action before seeking compensation under eminent domain. *Patrick Media Group, Inc. v. California Coastal Comm'n*, 9 Cal. App. 4th 592, 11 Cal. Rptr. 2d 824 (1992), involved an inverse condemnation claim for the value of billboards removed by Commission action. The compensation claim must be first presented through a Section 1094.5 mandate action. An action for compensation under eminent domain could be joined with, or could follow, the Section 1094.5 action. The policy reason for this approach is that the Section 1094.5 action has a 30-day statute of limitations whereas an action for inverse condemnation can be brought five years after the taking occurred.

75. *Mystery Mesa Mission Christian Church, Inc. v. Assessment Appeals Bd.*, 63 Cal. App. 3d 37, 133 Cal. Rptr. 565 (1976) (Section 1094.5 unavailable

able under the Tort Claims Act,⁷⁶ actions for breach of contract by an agency,⁷⁷ or other recognized causes of action cognizable by courts in normal civil actions or by habeas corpus.⁷⁸

B. PROPER COURT FOR REVIEW

1. Present Law

As discussed above, present law lodges most judicial review of agency action in the superior court. However, the Supreme Court reviews Public Utilities Commission and State Bar Court decisions. The court of appeal reviews decisions of the Workers' Compensation Appeal Board,⁷⁹ the Agricultural Labor Relations

to review tax decision — refund suit is exclusive method); *Tivens v. Assessment Appeals Bd.*, 31 Cal. App. 3d 945, 107 Cal. Rptr. 679 (1973). However, I believe that the Legislature should make significant changes in California's tax adjudication system. As part of that process, the Legislature might decide to dispense with exclusive judicial review of tax decisions through a superior court refund action. Instead, it might permit judicial review through a petition for administrative review; however, in the interests of avoiding revenue loss, a taxpayer might be required to pay the tax before seeking review. For another example of de novo review, see Labor Code Section 98.2, which provides for appeal of awards by the Labor Commissioner by trial de novo. See also *Miller v. Foremost Motors, Inc.*, 16 Cal. App. 4th 1271, 20 Cal. Rptr. 2d 503 (1993).

76. MSAPA § 5-101(1) (act inapplicable to litigation in which sole issue is claim for money damages or compensation and agency whose action is at issue does not have statutory authority to determine the claim); Wash. Rev. Code § 34.05.510(a) (same).

77. See *Royal Convalescent Hosp. v. State Bd. of Control*, 99 Cal. App. 3d 788, 160 Cal. Rptr. 458 (1979), which correctly holds Section 1094.5 inapplicable to review of a decision by the Board of Control to reject a contract claim against the state. The claim could be prosecuted by a normal damage action against the state. That procedure should not be circumvented by review of the decision of the Board of Control rejecting the claim, whether or not the Board provided a hearing.

78. Section 2 of the Oregon legislation, *supra* note 56, has a long list of exceptions, some of which were obviously negotiated with agencies (such as exceptions for workers' compensation and unemployment insurance), but some of which are appropriate and generic.

79. Lab. Code § 5950.

Board,⁸⁰ the Public Employees Relations Board,⁸¹ and the Alcoholic Beverage Control Appeals Board.⁸² This seems to me like an illogical hodgepodge.

There is no clear pattern in other jurisdictions. Under federal practice, a great many agency rules and adjudications are reviewed at the court of appeals level. However, many types of cases remain in the federal district court, most importantly immigration and social security cases (and any others not allocated by statute to the court of appeals). The cases in district court tend to be fact intensive cases with relatively small stakes. The federal model thus would suggest that a relatively large number of California cases now heard by superior courts could be moved to the court of appeal.

In New York, all judicial review cases are filed in the trial court; however, the trial court transfers to the appellate division cases in which a formal adjudicatory hearing occurred. The theory, apparently, was that these cases do not require taking any additional evidence and are instead decided upon the agency record under the substantial evidence test.⁸³

The trend in newer judicial review statutes is to place a significant portion of judicial review cases into appellate rather than trial courts. The unenacted Oregon legislation provided for appellate court review of adjudicatory cases and of rules. All other cases would have been reviewed in the trial court.⁸⁴ The Utah statute provides for review of formal adjudicatory action in an appellate

80. *Id.* § 1160.8.

81. Gov't Code §§ 3520(c), 3542(c), 3564(c).

82. Bus. & Prof. Code § 23090.

83. N.Y. Civ. Prac. L. & R. §§ 7803(4), 7804(g).

84. Oregon legislation, *supra* note 56, § 8(1), (2). By stipulation of the parties, however, any other case could be heard by the appellate court if it is required by law to be determined exclusively on a record and its validity can be determined without any judicial factfinding. *Id.* § 8(3). The Oregon legislation also provides that if a case is filed in the wrong court, it will be transferred to the correct court without having to be refiled. *Id.* § 9.

court; all other cases are in the trial court.⁸⁵ Minnesota places review of both formal adjudication and rules in appellate courts.⁸⁶ Florida places review of all state agency action in an appellate court.⁸⁷ On the other hand, the new Washington statute calls for review in the trial court.⁸⁸

2. Recommendation

Resolving the issue of the proper court for judicial review of agency action is difficult. The path of least resistance is to leave things as they are. However, I do not believe that would be the best course.⁸⁹

I propose transferring the initial review of a significant body of the cases now in the superior court to the courts of appeal.⁹⁰ The

85. Utah Code Ann. §§ 63-46a-13 (declaratory judgment in trial court to review rules), 63-46b-15 (informal adjudicatory proceedings reviewed in trial court), 63-46b-16 (formal adjudicatory proceedings reviewed in appellate court).

86. Minn. Stat. Ann. §§ 14.44 (rules), 14.63 (formal adjudication). See Hanson, *The Court of Appeals and Judicial Review of Agency Action*, 10 Wm. Mitchell L. Rev. 645 (1984) (pointing out that this statute is not exclusive and continues to allow challenges through common law writs and equitable remedies in the trial court).

87. Fla. Stat. Ann. § 120.68(2).

88. Wash. Rev. Code § 324.05.518 (1990). There is an exception for cases certified to the appellate court by the trial court. Certification can occur only if judicial review is limited to the record and there are fundamental issues involved requiring a prompt determination.

89. If that is the Commission's decision, it should explore whether to make review by the court of appeal of superior court decisions discretionary rather than available as of right. This would diminish the burden that the present system of two-level judicial review imposes on the courts. Workers' compensation cases are now heard initially in the court of appeal but under a system of discretionary review; in most cases, the court summarily declines to grant a writ of review. Court of appeal justices told me they favor this system.

Another proposal I did not explore would be creation of a new court system to hear administrative appeals. While there is much to be said in favor of a specialized court, the shortage of state budgetary resources makes any such plan completely infeasible.

90. See Admin. Conf. of the U.S. Recommendation 75-3, 1 C.F.R. § 305.75-3; Currie & Goodman, *Judicial Review of Administrative Action: Quest for the Optimum Forum*, 75 Colum. L. Rev. 1 (1975); 4 K. Davis, *Administrative Law*

Commission has not yet decided whether to abolish completely the independent judgment test in connection with review of state agency action. At this writing, it appears that the use of the independent judgment test will be greatly restricted.⁹¹ In most cases, the test will be substantial evidence. In such cases, the function being discharged by a reviewing court is fundamentally appellate, rather than trial.⁹² Essentially the court is asked to decide questions of law and to assess the reasonableness of the agency's fact findings and discretionary decisions. Review of such issues from a well-organized record seems more appropriately the work of specialists in appeals — i.e., appellate courts.⁹³ Thus a system that lodges cases at the appellate level makes sense, because it calls on the relevant expertise of appellate justices. Even if some issues in some cases remain to be decided under independent judgment, I would not shift those cases to trial courts; appellate courts can decide those issues as well.⁹⁴

Treatise § 23.5 (2d ed. 1983) (review of administrative action should be in a court of appeal except where evidence needs to be taken).

91. Currently the Commission has decided that independent judgment should continue to apply in cases where agency heads reverse the fact findings of presiding officers. I hope this decision will be reconsidered so that independent judgment would apply only with respect to cases initially decided by ALJs in the Office of Administrative Hearings and also only to reversals of presiding officer findings based on demeanor of witnesses.

92. Dissenting in *Bixby v. Pierno*, 4 Cal. 3d 130, 159 n.21, 93 Cal. Rptr. 234 (1971), Justice Burke wrote: "If a uniform substantial evidence review were adopted, the Court of Appeal rather than the trial court would be the logical forum to perform the review function. Preliminary review by the trial court would be superfluous and uneconomic in cases requiring no determination of controverted issues of fact."

93. In the rare situation in which the appellate court needs to receive evidence and does not wish to remand to the agency, there should be provision for appointment of a referee or special master to receive the evidence. See MSAPA § 5-114(a).

94. I would not favor a system which allocated to trial courts cases in which independent judgment applied and to appellate courts cases in which substantial evidence applied. This would be extremely difficult to apply, since there would be constant questions about which court a case should be filed in (i.e., did the

There is another significant advantage of transferring authority to the court of appeal: judicial review will be centralized into relatively few courts. Present practice disperses the cases to superior court judges throughout the state, many of them inexperienced in administrative law. This change should ensure a more uniform pattern of decisions, one less influenced by luck of the draw or hometown favoritism. The collegial character of court of appeal decisionmaking should insure a higher quality of decision, a greater number of reported administrative law cases, and a better system of precedents.⁹⁵ This is especially important because a new APA will undoubtedly generate a good many interpretive disputes; it would be helpful to have an accessible body of precedents on these issues that will be generated without unnecessary delay. Transfer to the appellate level should also save the state money since its attorneys will have to do less traveling to superior courts in remote counties. And by substituting one level of review for two, this proposal will save money for litigants on both sides and bring disputes to a conclusion years sooner than under existing law.

Probably judicial review of all cases of adjudication covered by the new APA adjudication procedures should be moved to the court of appeal.⁹⁶ The exception would be those types of cases that generate a large volume of relatively low-stakes, fact-oriented appeals, few of which are likely to go beyond the superior court. Here I have DMV driver's license cases specifically in mind. Decisions in welfare or unemployment cases might also fall into this category. These are cases that should probably remain in the supe-

agency head reverse the presiding officer on a question of law or fact; if of fact the case goes to the trial court, if of law to the appellate court).

95. See Currie & Goodman, *supra* note 90, at 12. The fact that most administrative law decisions are made now in unreported trial court decisions (or in depublished court of appeal decisions) drastically limits the amount of available precedents on many important issues.

96. A compromise proposal might be to move the review only of those cases heard by an OAH ALJ to the appellate court. In general, a relatively high percentage of cases involving professional licenses and of civil rights find their way to the appellate courts; they might as well start there.

rior court. Doing so would decrease the burden on the appellate courts and perhaps would serve the convenience of litigants who could save money by going to their local trial court.⁹⁷

Similarly, review of rules adopted under the APA's rulemaking procedures should occur initially in the court of appeal,⁹⁸ since that process generates a well-organized record⁹⁹ and the issues have already been scrutinized by OAL. The issues raised on appeal tend to be questions of law, procedure, or whether a rule was reasonably necessary (a version of the abuse of discretion test). There are not many cases of this sort and the burden on appellate courts should not be substantial. Instead, the public interest may be served by having an appellate decision on important public policy issues more quickly. Undeniably, some cases involving review of rules can involve large records presenting numerous difficult technical issues. Such cases are burdensome to whatever court considers them; because of the high stakes, however, they are likely to find their way to an appellate court. Thus even in these cases, there is little advantage to anyone (including the appellate justices) from having the cases run first through the superior court.¹⁰⁰

Courts of appeal should have the same power that reviewing courts at all levels now have to affirm an agency decision without oral argument after the filing of points and authorities and after the

97. See Admin. Conf. of the U.S. Recommendation 75-3, 1 C.F.R. § 305.75-3, suggesting that immigration cases and social security retirement and disability cases remain in the federal district court and that appeals concerning benefits under the black lung program be transferred to federal district courts.

98. See Currie & Goodman, *supra* note 90, at 39-54. Of course, the validity of regulations is sometimes questioned in the course of an enforcement action in a trial court against a person alleged to have violated the rules. That person should always be able to obtain review of the validity of regulations in the course of a criminal or civil enforcement action. See *supra* text accompanying note 73.

99. See Gov't Code §§ 11346.8(d), 11347.3, 11350(b). The record must be indexed. *Id.* § 11347.3(a)(12).

100. It can be argued that the court of appeal needs to do less work on a case that has been initially decided by the superior court than on a case that has not yet been subject to any judicial scrutiny. However, OAL scrutiny of rules serves this function at least as well as trial court scrutiny.

record has been filed with the court.¹⁰¹ Indeed, there is an unresolved constitutional issue lurking here; it can be argued (although I do not agree with this argument) that the court of appeals must have the power to summarily affirm.¹⁰²

Finally, I would leave review of local agency decisions, and of state agency decisions that are not governed by APA procedures, in the superior court.¹⁰³ Because these kinds of decisions are often made under highly informal procedures, they tend to produce less well-organized records. Many, but far from all, involve low stakes, which suggests that the trial court is a better place to hear them and that they are unlikely to be appealed after the trial court deci-

101. See *supra* text accompanying notes 10-11.

102. Under Article VI, Section 10, of the California Constitution, courts of appeal “have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition.” Under Section 11 (as revised in 1966), “courts of appeal have appellate jurisdiction when superior courts have original jurisdiction and in other causes prescribed by statute.” I believe that appellate review of an administrative decision is a “cause” and the Legislature can confer appellate jurisdiction on the court of appeal to hear this “cause” under Section 11. See *Sarracino v. Superior Court*, 13 Cal. 3d 1, 9-10, 118 Cal. Rptr. 21 (1974) (“cause” is the proceeding before the court); *Quezada v. Superior Court*, 171 Cal. App. 2d 528, 530, 340 P.2d 1018 (1959) (a “cause” includes every matter that could come before a court for decision). Therefore, it is not necessary to rely on the provision in Section 10 relating to original jurisdiction in extraordinary writ cases, and there is no need to incorporate anything from existing writ practice in the petition for review procedure.

However, the Supreme Court left this issue somewhat in doubt when it upheld appellate-level consideration of petitions for review of the decisions of the Agricultural Labor Relations Board. *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.*, 24 Cal. 3d 335, 347-52, 156 Cal. Rptr. 1 (1979). Although the court noted that the analysis in the preceding paragraph based on appeal under Section 11 was “arguable,” *id.* at 347, it upheld the petition for review as an exercise of extraordinary writ authority under Section 10. To do so, it had to infer that the Legislature wished to give the reviewing court the power to summarily deny a petition in its sound discretion after providing for a fair opportunity for the petitioner to file points and authorities and after the ALRB has provided the record to the court.

103. Utah followed this pattern — formal adjudication is reviewed in an appellate court, informal adjudication in a trial court. See *supra* note 53.

sion.¹⁰⁴ Moreover, I am concerned by the possible additional burden on appellate courts of having to decide a large volume of time-consuming and complex cases concerning local land-use planning or environmental law. There may also be a significant volume of appeals arising out of local personnel or education decisions.

The proposal to transfer a significant volume of cases from the superior court to the court of appeal would lighten the load on our superior courts, but it would increase the load of the courts of appeal. Note, however, that a reasonably high percentage of appealed cases get to the court of appeal from the superior court anyway because, if there was enough at stake to litigate, there may be enough to appeal.¹⁰⁵ As to cases that go to the court of appeal anyway, there would be no increase in the court of appeal caseload. Starting these cases in the court of appeal would save money for the state and the litigants alike. Nevertheless, it is undeniable that the workload of the court of appeal would be increased by cases that now start and terminate in the superior court; and, of course, this means that three judges must consider a case that under present practice is finally disposed of by only one. The views of the Judicial Council on these issues will, no doubt, be influential with the Law Revision Commission.¹⁰⁶

104. Such cases may more frequently require the court to receive additional evidence, which is more easily done in a trial court.

105. Unfortunately, no statistics are available to help us estimate what this percentage is. Estimates from lawyers and judges vary widely and tend to reflect the particular subspecialty in which the attorney is engaged.

Cases are somewhat more likely to be appealed from superior court to the court of appeal under a substantial evidence regime than an independent judgment regime. As pointed out in the study on scope of review, under present law a trial judge's decision under independent judgment is almost unreviewable by the court of appeal, while a trial judge's decision applying the substantial evidence test is subject to greater scrutiny by the court of appeal.

On the other hand, under a regime of substantial evidence rather than independent judgment, there will be fewer cases brought to court in the first place. A litigant always has a shot in an independent judgment case but given a reasonably strong case on both sides, it is likely that substantial evidence supports the agency decision on factual questions.

106. As mentioned earlier, an additional disadvantage of the proposal to shift cases to the court of appeal is that it would be difficult for appellate courts to

This proposal also entails moving initial review of PUC and State Bar Court decisions from the Supreme Court to the court of appeal. My belief is that the Supreme Court is too busy to take seriously review of the complex decisions of the PUC. They are normally summarily affirmed.¹⁰⁷ Of course, the PUC welcomes a situation in which its decisions are essentially unreviewable, but it is hard to explain why this one agency should be exempt from judicial scrutiny. Other agencies that engage in complex economic regulation, such as the Water Resources Control Board, must suffer the indignities of judicial scrutiny; why not the PUC as well?¹⁰⁸

For similar reasons, it seems more appropriate that decisions of the Review Department of the State Bar Court be reviewed by the court of appeal than the Supreme Court;¹⁰⁹ now that review of these decisions is discretionary rather than available as of right, it would appear that appellants are more likely to receive review at

give the same priority to judicial review cases as is provided now by many superior courts.

107. See Lakusta & Renton, *California Supreme Court Review of Decisions of the Public Utilities Commission — Is the Court's Denial of a Writ of Review a Decision on the Merits?*, 39 Hastings L.J. 1147 (1988) (court denies writ in at least 90% of PUC cases without consideration of the record or statement of reasons, yet the decisions are treated as *res judicata*).

108. See Comment, "*Basic Findings*" and *Effective Judicial Review of the California Public Utilities Commission*, 13 UCLA L. Rev. 313 (1966) (criticizing Supreme Court rubber stamp review); Lakusta & Renton, *supra* note 107. According to the leading treatise on public utility law, "The road to upsetting a determination of the California commission probably climbs a steeper grade than any other similar route in the country." 1 A.J.G. Priest, *Principles of Public Utility Regulation* 27 (1969). However, in partial compensation to the PUC, the Legislature should repeal Public Utilities Code Section 1756, which calls for independent judgment on the law and the facts when a PUC order is challenged on constitutional grounds. This section is based on outdated constitutional notions. Substantial evidence review is appropriate even where a PUC order is challenged as confiscatory. Of course, PUC findings of legislative fact and PUC exercises of statutory discretion would be treated with great deference by courts under applicable scope of review principles.

109. These decisions can be reviewed by either the Supreme Court or the court of appeal in accordance with procedures prescribed by the Supreme Court. Bus. & Prof. Code § 6082.

the court of appeal level than at the Supreme Court level.¹¹⁰ Moreover, review of individual attorney discipline cases is simply not a wise use of the Supreme Court's precious resources.¹¹¹

I polled a good many lawyers and judges on the issue of whether to shift judicial review of most administrative decisions from the superior court to the court of appeal. The results showed no clear pattern. Some practicing lawyers wanted all cases kept in the superior court; others preferred a shift to the court of appeal. Court of appeal justices, unsurprisingly, were apprehensive about the extra workload. Superior court judges were about evenly divided.

A few final points: the statute should contain a simple transfer procedure so that cases filed in the wrong court can be transferred to the correct court without the need to refile. The Oregon legislation has some well worked out provisions on transfers.

The statute should also provide a mechanism to deal with the situation in which a petition for judicial review is in the court of appeal but is joined with an action that requires a trial in the superior court, such as eminent domain or violation of the federal civil rights statute.¹¹² Res judicata concerns may require that all such actions be filed together or suffer preclusion. Perhaps the court of appeal should have discretion to allow all claims to be heard in the superior court, even though the petition for judicial review would normally be at the appellate level.

C. VENUE FOR JUDICIAL REVIEW

Under present law, superior court mandate actions seeking judicial review of state or local agency action are filed in the county in

110. Since 1991, the Supreme Court has not granted review of any of the discipline cases decided by the State Bar Court Review Department. 13 Cal. Law. 71 (July 1993).

111. See Comment, *Attorney Discipline and the California Supreme Court: Transfer of Direct Review to the Courts of Appeal*, 72 Cal. L. Rev. 252 (1984) (attorney discipline questions not important enough for direct Supreme Court review).

112. See *Griffin Homes, Inc. v. Superior Court*, 229 Cal. App. 3d 991, 1003-07, 280 Cal. Rptr. 792 (1991) (judicial review and Section 1983 civil rights claim).

which the cause of action arose.¹¹³ In licensing and personnel cases, this means the plaintiff's principal place of business;¹¹⁴ in non-licensing cases, it means where the injury occurred.¹¹⁵ Review of a driver's license suspension occurs in the county of the plaintiff's residence,¹¹⁶ and review of Medical Board decisions occurs only in Sacramento, Los Angeles, San Diego, or San Francisco.¹¹⁷ Depending on particular statutes, cases reviewable by the court of appeal are filed in the appellate district where the cause of action arose¹¹⁸ or where plaintiff resides.¹¹⁹

My recommendation concerning venue depends on whether my prior recommendation concerning review of APA cases in the

113. Section 393(1)(b): "the county in which the cause, or some part thereof, arose, is the proper county for the trial of the following actions: ... (b) Against a public officer or person especially appointed to execute his duties, for an act done by him in virtue of his office" However, tort and contract actions against the state must be filed in Sacramento or in any county where the Attorney General has an office. Section 401(1); Gov't Code § 955.

114. A cause "arises" in the county where the subject of agency action carried on business and would be hurt by official action, not where the agency signs the order or takes the challenged action. *Tharp v. Superior Court*, 32 Cal. 3d 496, 502, 186 Cal. Rptr. 335 (1982) (car dealer must seek review in Tulare County, his principal place of business; agency cannot shift venue to Sacramento); *Lynch v. Superior Court*, 7 Cal. App. 3d 929, 86 Cal. Rptr. 925 (1970) (dismissal of state employee — venue is proper where he worked, not where actions giving rise to charges against him occurred); *Sutter Union High Sch. Dist. v. Superior Court*, 140 Cal. App. 3d 795, 190 Cal. Rptr. 182 (1983) (same); *Duval v. Contractors' State License Bd.*, 125 Cal. App. 2d 532, 271 P.2d 194 (1954) (county in which contractor's business was situated).

115. *Regents of Univ. of Cal. v. Superior Court*, 3 Cal. 3d 529, 91 Cal. Rptr. 57 (1970) (taxpayers action against Regents because of unconstitutional regulations enforced against a UCLA faculty member — venue in Los Angeles).

116. Veh. Code § 13559; *Lipari v. DMV*, 16 Cal. App. 4th 667, 20 Cal. Rptr. 2d 246 (1993).

117. Bus. & Prof. Code § 2019.

118. See, e.g., Bus. & Prof. Code § 23090 (ABCAB case filed in appellate district where proceeding arose); Gov't Code § 3542(c) (PERB judicial review filed in appellate district where unit determination or unfair practice dispute occurred); Lab. Code § 1160.8 (ALRB review filed in appellate district where practice in question occurred or where person resides or transacts business).

119. Lab. Code § 5950 (workers' compensation).

court of appeal is accepted. If so, I suggest that the venue for petitions for judicial review (whether in superior court or in the court of appeal) be the county (or the appellate district) of the petitioner's residence or principal place of business.¹²⁰ This approach seems somewhat more determinate than the existing rule, which is tied to the county where the cause of action arose, but it would not significantly change the results.¹²¹ The primary reason for choosing the petitioner's locale (rather than the agency's or the Attorney General's locale) is convenience to the petitioner.¹²² Cases filed in the wrong superior court or court of appeal should not be dismissed but should be transferred to the proper court.¹²³

If the Commission decides not to follow my recommendation to lodge review of APA cases in the court of appeal, then my recommendation concerning venue is different. It is probable that superior court judges in small counties are inexperienced in administrative law matters. Most counties do not maintain a specialized writ and receiver department, so the cases are assigned to judges at random. Some say there is a significant hometown advantage for the petitioner. For that reason, if review of APA cases is to remain lodged in superior court, venue in actions against state agencies

120. If plaintiff resides and has a principal place of business in different counties, plaintiff could choose between the two. In cases brought against local agencies, the recommended provision would change the rule of Section 394 (action against city or county generally tried where local agency is located); as a practical matter most actions against local agencies are filed by persons living in the locality so the change is not substantial.

121. Another approach the Commission might consider would be to give petitioner a choice between his or her locale (home or principal place of business) and the place where the agency is located or, if the Attorney General will represent the agency, a city where the Attorney General has an office. See Fla. Stat. Ann. § 120.68(2) (venue is appellate court in district where agency maintains headquarters or a party resides); MSAPA § 5-104 (offering states the choice of the state capital or the plaintiff's residence).

122. "The underlying purpose of statutory provisions as to venue for actions against state agencies is to afford to the citizen a forum that is not so distant and remote that access to it is impractical and expensive.... Access to the judicial forum should be as expeditious, inexpensive, and direct as possible." *Regents of Univ. of Cal. v. Superior Court*, 3 Cal. 3d 529, 536, 91 Cal. Rptr. 57 (1970).

123. *Lipari v. DMV*, 16 Cal. App. 4th 667, 20 Cal. Rptr. 2d 246 (1993).

should be located in Sacramento or, where the agency is represented by the Attorney General, in counties where the Attorney General has an office (Sacramento, Los Angeles, San Francisco, and San Diego).¹²⁴ This is presently required in Medical Board cases.¹²⁵

Assuming review remains in the superior court, it seems particularly important to centralize review of state agency legislative action (such as adoption of regulations) in the superior courts of larger counties or in Sacramento. Typically a large number of petitioners would have standing to challenge such matters. If plaintiffs could sue in their home county, there would be substantial opportunity to forum shop. Yet these cases tend to be difficult (they involve review of a rulemaking record) and often involve issues of large public importance. The superior court judges who must decide them should be more experienced and specialized in administrative law than superior court judges in general.

D. STAYS PENDING REVIEW

1. Existing Law

Under the existing APA, an agency has power to stay its own decision.¹²⁶ Regardless of whether the agency did so, the superior court has discretion to stay the agency action, but should not impose or continue a stay if it is satisfied that it would be against the public interest.¹²⁷ A stricter standard is imposed in medical, osteopathic, or chiropractic cases in which a hearing was provided under the APA.¹²⁸ The stricter standard also applies to non-health

124. Section 401(1).

125. Bus. & Prof. Code § 2019.

126. Gov't Code § 11519(b).

127. Section 1094.5(g). The public interest determination must be made on a case-by-case basis by the court in which administrative mandamus is sought. *Sterling v. Santa Monica Rent Control Bd.*, 168 Cal. App. 3d 176, 186-87, 214 Cal. Rptr. 71 (1985) (improper for court in which prohibition was sought to grant a stay pending judicial review).

128. The constitutionality of imposing the stricter standard in medical cases was upheld in *Board of Medical Quality Assurance v. Superior Court*, 114 Cal. App. 3d 272, 170 Cal. Rptr. 468 (1980).

care APA cases in which the agency heads adopted the ALJ's proposed decision in its entirety (or adopted the proposed decision and reduced the penalty). Under this stricter standard, a stay should not be granted unless the court is satisfied that the public interest will not suffer and the agency is unlikely to prevail ultimately on the merits.¹²⁹ The court has power to condition a stay order upon the posting of a bond.¹³⁰

If the trial court denies the writ and a stay is in effect, the appellate court can continue the stay (and must continue it for 20 days after a notice of appeal is filed). If the trial court grants the writ, the agency action is stayed pending appeal unless the appellate court otherwise orders.¹³¹ In cases not arising under Section 1094.5, presumably a trial court and an appellate court have the normal power to grant a stay through a preliminary injunction.

2. Recommendation

The draft statute already provides that an agency may grant a stay of its decision.¹³² As to stays on judicial review, present Cali-

129. Section 1094.5(h)(1). The statute requires a preliminary assessment of the merits of the petition and a conclusion that the petitioner is likely to obtain relief; it is insufficient that petitioner merely state a possibly viable defense or restate arguments rejected by the ALJ or the agency. *Medical Bd. v. Superior Court*, 227 Cal. App. 3d 1458, 278 Cal. Rptr. 247 (1991); *Board of Medical Quality Assurance v. Superior Court*, 114 Cal. App. 3d 272, 170 Cal. Rptr. 468 (1980).

In APA cases not involving health care licensing, this stricter standard does not apply if the agency rejected the ALJ's decision. In such cases, the laxer standard of Section 1094.5(g) applies.

130. *Venice Canals Resident Home Owners Ass'n v. Superior Court*, 72 Cal. App. 3d 675, 140 Cal. Rptr. 361 (1977) (bond protects interests of homeowners who were allowed to build homes by the agency order under review during lengthy period of delay while the record is prepared). Even if petitioner is indigent, the court still has discretion to order posting of a bond as a condition to granting a stay. *Id.*

131. Section 1094.5(g), (h)(3).

132. See Sections 650.110(a)(2) & 650.120 in administrative adjudication draft attached to Commission staff Memorandum 92-70 (Oct. 9, 1992) (on file with California Law Revision Commission). It should be made clear in a comment that it is not necessary for a petitioner to exhaust the remedy of requesting

ifornia law should be simplified by unifying the standards. There is no apparent reason why the stay standard should vary depending on what sort of case is involved or whether the agency heads did or did not adopt the judge's original decision.

Moreover, the existing criteria for granting stays seem unduly narrow; in addition to the factors relating to the public interest and the likelihood of success on the merits, the court should consider the degree to which the applicant for a stay will suffer irreparable injury from denial of a stay and the degree to which the grant of a stay would harm third parties.¹³³ If these factors were cranked into the equation, the standard for granting a stay would be similar to the standard for granting a preliminary injunction, which it closely resembles.¹³⁴

The comment should also approve case law¹³⁵ that allows the court to condition the granting of a stay upon posting of a bond in order to protect third parties.¹³⁶

a stay from the agency in order to request one from the court. [Ed. note. This provision was not included in the Commission's final recommendation.]

133. See MSAPA § 5-111(c). Harm to third parties is often a relevant concern in the case of local zoning and environmental decisions.

134. See *Cohen v. Board of Supervisors*, 40 Cal. 3d 277, 286, 219 Cal. Rptr. 467 (1985); 6 B. Witkin, *California Procedure Provisional Remedies* §§ 282-83, at 241-43 (3d ed. 1985).

135. See *supra* note 130.

136. MSAPA Section 5-111 is somewhat different from this recommendation. That section casts the stay decision as judicial review of an agency's decision to deny a stay. That implies that requesting an agency to grant a stay is an administrative remedy that must be exhausted. I do not think that should be required.

In cases involving threats to public health, safety, or welfare, Section 5-111 provides that no stay can be granted unless the court finds the petitioner is likely to prevail on the merits, the petitioner would suffer irreparable injury if denied a stay, the grant of relief will not substantially harm third parties, and the threat to public health, safety or welfare relied on by the agency is not sufficiently serious to justify denial of a stay. In cases not involving a substantial threat to public health, safety or welfare, the court shall grant relief if, in its independent judgment, the agency's denial of temporary relief was unreasonable in the circumstances.

